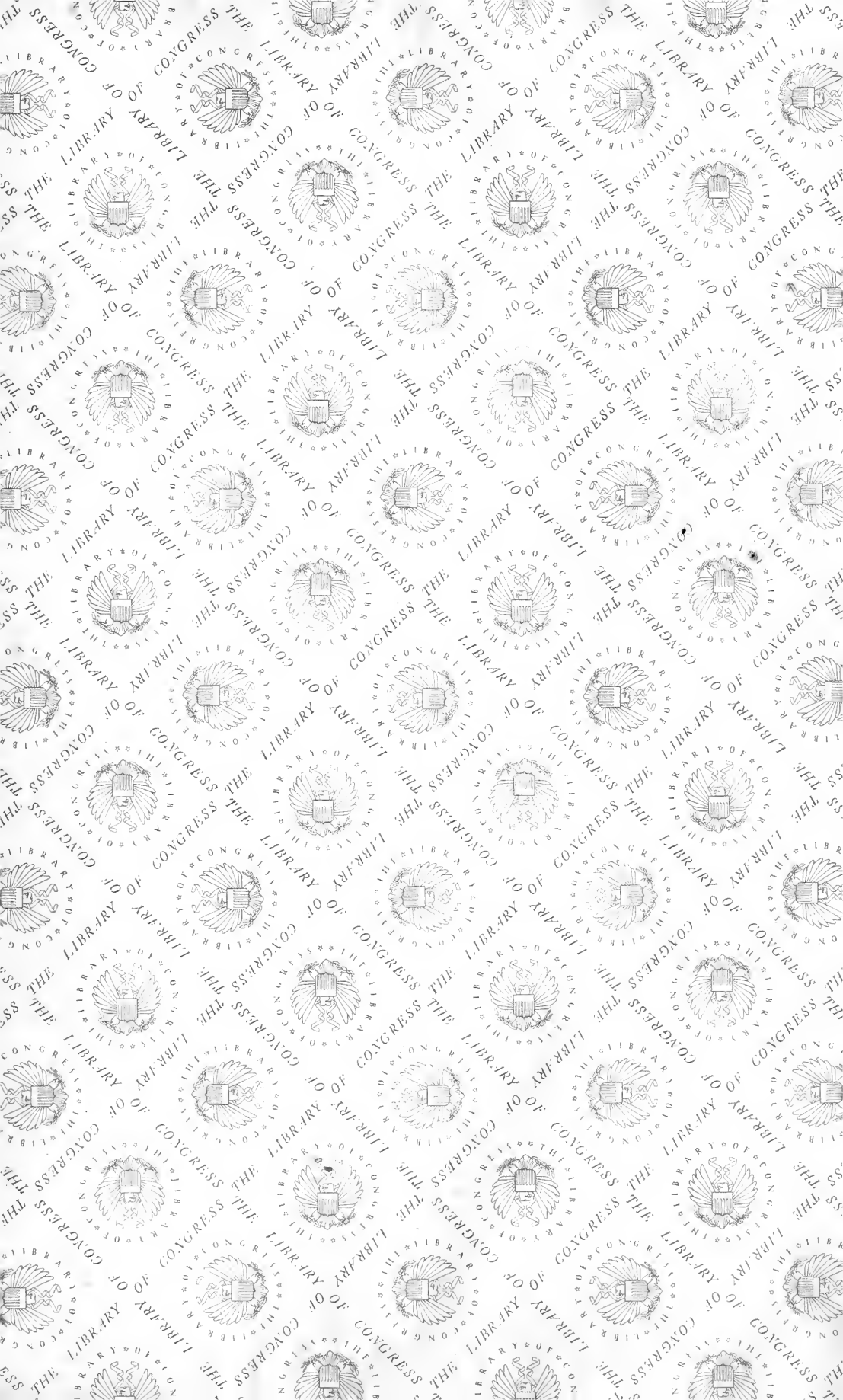
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CASES

ON

CONSTITUTIONAL LAW

SELECTED BY

JOHN DAY SMITH, M. A., LL. M.

Lecturer on American Constitutional Law, College of Law, University of Minnesota

ST. PAUL, MINN.

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PREFACE.

The difficulty experienced by a large body of law students in obtaining access to the United States Supreme Court Reports has led to the preparation of this volume. The cases have been selected by the author to be studied in connection with his lectures, at the University of Minnesota, on American constitutional law. With one exception they have been taken from the United States Supreme Court Reports. For the convenience of students, the Constitution of the United States has been inserted. It is not claimed that the whole field of American constitutional law has been covered in this compilation. The design has been to present those cases only which best illustrate the more important principles, leaving to the instructor to add to the list such cases as he may think best.

JOHN DAY SMITH.

Minneapolis, Minn., March 10, 1896.

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CONSTITUTION OF THE UNITED STATES.

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, [which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other persons.][1] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

[1] Superseded by Fourteenth Amendments.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE. II.

Section. 1. The Executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who

have equal Votes, the Senate shall chuse from them by Ballot the Vice President.][2]

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers: he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

[2] Superseded by Twelfth Amendment.

Section. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE. III.

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;[3]—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE. IV.

Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of

[3] Limited by the Eleventh Amendment.

the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate.

ARTICLE. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office of public Trust under the United States.

ARTICLE. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independance of the United States of America the Twelfth IN WITNESS whereof We have hereunto subscribed our Names.

Go: WASHINGTON—Presidt.
and deputy from Virginia.

Attest WILLIAM JACKSON, Secretary.

New Hampshire.
JOHN LANGDON
NICHOLAS GILMAN

Massachusetts.
NATHANIEL GORHAM
RUFUS KING

Connecticut.
WM : SAML JOHNSON
ROGER SHERMAN

New York.
ALEXANDER HAMILTON

New Jersey.
WIL : LIVINGSTON
DAVID BREARLEY
WM. PATERSON
JONA : DAYTON

Pennsylvania.
B FRANKLIN
THOMAS MIFFLIN
ROBT. MORRIS
GEO. CLYMER
THOS. FITZ SIMONS
JARED INGERSOLL
JAMES WILSON
GOUV MORRIS

Delaware.
GEO : READ
GUNNING BEDFORD jun
JOHN DICKINSON
RICHARD BASSETT
JACO : BROOM

Maryland.
JAMES MCHENRY
DAN OF ST. THOS. JENIFER
DANL CARROLL

Virginia.
JOHN BLAIR—
JAMES MADISON Jr.

North Carolina.
WM : BLOUNT
RICHD. DOBBS SPAIGHT
HU WILLIAMSON

South Carolina.
J. RUTLEDGE
CHARLES COTESWORTH PINCKNEY
CHARLES PINCKNEY
PIERCE BUTLER.

Georgia.
WILLIAM FEW
ABR BALDWIN

AMENDMENTS OF THE CONSTITUTION.[4]

FIRST. Dec. 15, 1791. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

SECOND. 1791. A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

THIRD. 1791. No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

FOURTH. 1791. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH. 1791. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH. 1791. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

SEVENTH. 1791. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

EIGHTH. 1791. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

NINTH. 1791. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

TENTH. 1791. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ELEVENTH. Jan. 8, 1798. The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

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[4] All the Amendments to the Constitution were proposed by Congress.

TWELFTH. Sept. 25, 1804. The Electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

THIRTEENTH. Dec. 18, 1865. Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

FOURTEENTH. July 28, 1868. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for par-

ticipation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

FIFTEENTH. March 30, 1870. Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

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ILLUSTRATIVE CASES

ON

CONSTITUTIONAL LAW.

HANS v. STATE OF LOUISIANA.[1]

(10 Sup. Ct. 504, 134 U. S. 1.)

Supreme Court of the United States. March 3, 1890.

In error to the circuit court of the United States for the eastern district of Louisiana.

J. D. Rouse and *Wm. Grant*, for plaintiff in error. *W. H. Rogers*, *B. J. Sage*, and *Alex. Porter Morse*, for defendant in error.

BRADLEY, J. This is an action brought in the circuit court of the United States, in December, 1884, against the state of Louisiana, by Hans, a citizen of that state, to recover the amount of certain coupons annexed to bonds of the state, issued under the provisions of an act of the legislature approved January 24, 1874. The bonds are known and designated as the "consolidated bonds of the state of Louisiana," and the coupons sued on are for interest which accrued January 1, 1880. The grounds of the action are stated in the petition as follows: "Your petitioner avers that by the issue of said bonds and coupons said state contracted with and agreed to pay the bearer thereof the principal sum of said bonds forty years from the date thereof, to-wit, the 1st day of January, 1874, and to pay the interest thereon represented by coupons as aforesaid, including the coupons held by your petitioner, semi-annually upon the maturity of said coupons; and said legislature, by an act approved January 24, 1874, proposed an amendment to the constitution of said state, which was afterwards duly adopted, and is as follows, to-wit: 'No. 1. The issue of consolidated bonds, authorized by the general assembly of the state at its regular session in the year 1874, is hereby declared to create a valid contract between the state and each and every holder of said bonds, which the state shall by no means and in no wise impair. The said bonds shall be a valid obligation of the state in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof or the levy and collection of the tax therefor. To secure such levy, collection, and payment the judicial power shall be exercised when necessary. The tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year until the bonds shall be paid, principal and interest, and the proceeds shall be paid by the treasurer of the state to the holders of said bonds as the principal and interest of the same shall fall due, and no further legislation or appropriation shall be requisite for the said assessment, and collection and for such payment from the treasury.' And petitioner further avers that, notwithstanding said solemn compact with the holders of said bonds, said state hath refused and still refuses to pay said coupons held by petitioner, and by its constitution, adopted in 1879, ordained as follows: 'That the coupons of said consolidated bonds falling due the 1st of January, 1880, be, and the same is hereby, remitted, and any interest taxes collected to meet said coupons are hereby transferred to defray the expenses of the state government;' and by article 257 of said constitution also prescribed that 'the constitution of this state, adopted in 1868, and all amendments thereto, is declared to be superseded by this constitution;' and said state thereby undertook to repudiate her contract obligations aforesaid, and to prohibit her officers and agents executing the same, and said state claims that by said provisions of said constitution she is relieved from the obligations of her aforesaid contract, and from the payment of said coupons held by petitioner, and so refuses payment thereof, and has prohibited her officers and agents making such payment. Petitioner also avers that taxes for the payment of the interest upon said bonds due January 1, 1880, were levied, assessed, and collected, but said state unlawfully and wrongfully diverted the money so collected, and appropriated the same to payment of the general expenses of the state, and has made no other provision for the payment of said interest. Petitioner also avers that said provisions of said constitution are in contravention of said contract, and their adoption was an active violation thereof, and that said state thereby sought to impair the validity thereof with your petitioner, in violation of article 1, section 10, of the constitution of the United States, and the effect so given to said state constitution does impair said contract. Wherefore petitioner prays that the state of Louisiana be cited to answer this demand, and that after due proceedings she be condemned to pay your petitioner said sum of ($87,500) eighty-seven thousand five hundred dollars, with legal interest from January 1, 1880, until paid, and all costs of suit; and petitioner prays for general relief."

A citation being issued, directed to the state, and served upon the governor thereof, the attorney general of the state filed an exception, of which the following is a copy, to-wit: "Now comes defendant, by the attorney general, and excepts to plaintiff's suit, on the ground that this court is without jurisdiction *ratione personæ*. Plaintiff cannot sue the state without its permission; the constitution and laws do not give this honorable court jurisdiction of a suit against the state; and its jurisdiction is respectfully declined. Wherefore respondent prays to be hence dismissed, with costs, and for general relief." By the judgment of the court this exception was sustained, and the suit was dismissed. See Hans v. Louisiana, 24 Fed. Rep. 55. To this judgment the present writ of error is brought; and the question is presented whether a state can be sued in a circuit court of the United States by one of its own citizens upon a suggestion that the case is one that arises under the constitution or laws of the United States.

The ground taken is that under the constitution, as well as under the act of congress passed to carry it into effect, a case is within the jurisdiction of the federal courts, without regard to the character of the parties, if it arises under the constitution or laws of the United States, or, which is the same thing, if it necessarily involves

[1] Affirming 24 Fed. Rep. 55.

a question under said constitution or laws. The language relied on is that clause of the third article of the constitution, which declares that "the judicial power of the United States shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" and the corresponding clause of the act conferring jurisdiction upon the circuit court, which, as found in the act of March 3, 1875, is as follows, to-wit: "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, * * * arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority." It is said that these jurisdictional clauses make no exception arising from the character of the parties, and therefore that a state can claim no exemption from suit, if the case is really one arising under the constitution, laws, or treaties of the United States. It is conceded that, where the jurisdiction depends alone upon the character of the parties, a controversy between a state and its own citizens is not embraced within it; but it is contended that, though jurisdiction does not exist on that ground, it nevertheless does exist if the case itself is one which necessarily involves a federal question; and, with regard to ordinary parties, this is undoubtedly true. The question now to be decided is whether it is true where one of the parties is a state, and is sued as a defendant by one of its own citizens.

That a state cannot be sued by a citizen of another state, or of a foreign state, on the mere ground that the case is one arising under the constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases. Louisiana v. Jumel, 107 U. S. 711, 2 Sup. Ct. Rep. 128; Hagood v. Southern, 117 U. S. 52, 6 Sup. Ct. Rep. 608; In re Ayers, 123 U. S. 443, 8 Sup. Ct. Rep. 164. Those were cases arising under the constitution of the United States, upon laws complained of as impairing the obligation of contracts, one of which was the constitutional amendment of Louisiana, complained of in the present case. Relief was sought against state officers who professed to act in obedience to those laws. This court held that the suits were virtually against the states themselves, and were consequently violative of the eleventh amendment of the constitution, and could not be maintained. It was not denied that they presented cases arising under the constitution; but, notwithstanding that, they were held to be prohibited by the amendment referred to.

In the present case the plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the eleventh amendment, inasmuch as that amendment only prohibits suits against a state which are brought by the citizens of another state, or by citizens or subjects of a foreign state. It is true the amendment does so read, and, if there were no other reason or ground for abating his suit, it might be maintainable; and then we should have this anomalous result, that, in cases arising under the constitution or laws of the United States, a state may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other states, or of a foreign state; and may be thus sued in the federal courts, although not allowing itself to be sued in its own courts. If this is the necessary consequence of the language of the constitution and the law, the result is no less startling and unexpected than was the original decision of this court, that, under the language of the constitution and of the judiciary act of 1789, a state was liable to be sued by a citizen of another state or of a foreign country. That decision was made in the case of Chisholm v. Georgia, 2 Dall. 419, and created such a shock of surprise throughout the country that, at the first meeting of congress thereafter, the eleventh amendment to the constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the states. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the supreme court. It did not in terms prohibit suits by individuals against the states, but declared that the constitution should not be construed to import any power to authorize the bringing of such suits. The language of the amendment is that "the judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." The supreme court had construed the judicial power as extending to such a suit, and its decision was thus overruled. The court itself so understood the effect of the amendment, for after its adoption Attorney General Lee, in the case of Hollingsworth v. Virginia, (3 Dall. 378,) submitted this question to the court, "whether the amendment did or did not supersede all suits depending, as well as prevent the institution of new suits, against any one of the United States, by citizens of another state." Tilghman and Rawle argued in the negative, contending that the jurisdiction of the court was unimpaired in relation to all suits instituted previously to the adoption of the amendment. But on the succeeding day, the court delivered an unanimous opinion "that, the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens or subjects of any foreign state."

This view of the force and meaning of the amendment is important. It shows that, on this question of the suability of the states by individuals, the highest authority of this country was in accord rather with the minority than with the majority of the court in the decision of the case of Chisholm v. Georgia; and this fact lends additional interest to the able opinion of Mr. Justice IREDELL on that occasion. The other justices were more swayed by a close observance of the letter of the

constitution, without regard to former experience and usage; and because the letter said that the judicial power shall extend to controversies "between a state and citizens of another state;" and "between a state and foreign states, citizens or subjects," they felt constrained to see in this language a power to enable the individual citizens of one state, or of a foreign state, to sue another state of the Union in the federal courts. Justice IREDELL, on the contrary, contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign states to actions at the suit of individuals, (which he conclusively showed was never done before,) but only, by proper legislation, to invest the federal courts with jurisdiction to hear and determine controversies and cases, beween the parties designated, that were properly susceptible of litigation in courts. Looking back from our present stand-point at the decision in Chisholm v. Georgia, we do not greatly wonder at the effect which it had upon the country. Any such power as that of authorizing the federal judiciary to entertain suits by individuals against the states had been expressly disclaimed, and even resented, by the great defenders of the constitution while it was on its trial before the American people. As some of their utterances are directly pertinent to the question now under consideration, we deem it proper to quote them.

The eighty-first number of the Federalist, written by Hamilton, has the following profound remarks: "It has been suggested that an assignment of the public securities of one state to the citizens of another would enable them to prosecute that state in the federal courts for the amount of those securities, a suggestion which the following considerations prove to be without foundation: It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of state sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us that there is no color to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against states for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting state; and to ascribe to the federal courts by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."

The obnoxious clause to which Hamilton's argument was directed, and which was the ground of the objections which he so forcibly met, was that which declared that "the judicial power shall extend to all * * * controversies between a state and citizens of another state, * * * and between a state and foreign states, citizens, or subjects." It was argued by the opponents of the constitution that this clause would authorize jurisdiction to be given to the federal courts to entertain suits against a state brought by the citizens of another state or of a foreign state. Adhering to the mere letter, it might be so, and so, in fact, the supreme court held in Chisholm v. Georgia; but looking at the subject as Hamilton did, and as Mr. Justice IREDELL did, in the light of history and experience and the established order of things, the views of the latter were clearly right, as the people of the United States in their sovereign capacity subsequently decided.

But Hamilton was not alone in protesting against the construction put upon the constitution by its opponents. In the Virginia convention the same objections were raised by George Mason and Patrick Henry, and were met by Madison and Marshall as follows. Madison said: "Its jurisdiction [the federal jurisdiction] in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. This will give satisfaction to individuals, as it will prevent citizens on whom a state may have a claim being dissatisfied with the state courts. * * * It appears to me that this [clause] can have no operation but this: to give a citizen a right to be heard in the federal courts, and, if a state should condescend to be a party, this court may take cognizance of it." 3 Elliott, Debates, 533. Marshall, in answer to the same objection, said: "With respect to disputes between a state and the citizens of another state, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. * * * It is not rational to suppose that the sovereign power should be dragged before a court. The intent is to enable states to recover claims of individuals residing in other states. * * * But, say they, there will be partiality in it if a state cannot be a defendant; if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant which does not prevent its being plaintiff." Id. 555.

It seems to us that these views of those

great advocates and defenders of the constitution were most sensible and just, and they apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a state. The reason against it is as strong in this case as it was in that. It is an attempt to strain the constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the eleventh amendment was adopted, it was understood to be left open for citizens of a state to sue their own state in the federal courts, while the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that congress, when proposing the eleventh amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the constitution or laws of the United States, can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face.

The truth is that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justifiable which were not known as such at the common law; such, for example, as controversies between states as to boundary lines, and other questions admitting of judicial solution. And yet the case of Penn v. Lord Baltimore, 1 Ves. Sr. 444, shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times; and several cases of the same general character arose under the articles of confederation, and were brought before the tribunal provided for that purpose in those articles. 131 U. S. App. 50. The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the states. Of other controversies between a state and another state or its citizens, which, on the settled principles of public law, are not subjects of judicial cognizance, this court has often declined to take jurisdiction. See Wisconsin v. Insurance Co., 127 U. S. 265, 288, 289, 8 Sup. Ct. Rep. 1370, and cases there cited.

The suability of a state, without its consent, was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice IREDELL in his opinion in Chisholm v. Georgia; and it has been conceded in every case since, where the question has, in any way, been presented, even in the cases which have gone furthest in sustaining suits against the officers or agents of states. Osborn v. Bank, 9 Wheat. 738; Davis v. Gray, 16 Wall. 203; Board, etc. v. McComb, 92 U. S. 531; U. S. v. Lee, 106 U. S. 196, 1 Sup. Ct. Rep. 240; Poindexter v. Greenhow, 109 U. S. 63, 3 Sup. Ct. Rep. 8; Virginia Coupon Cases, 114 U. S. 269, 5 Sup. Ct. Rep. 903–934, 962, 1020. In all these cases the effort was to show, and the court held, that the suits were not against the state or the United States, but against the individuals; conceding that, if they had been against either the state or the United States, they could not be maintained. Mr. Webster stated the law with precision in his letter to Baring Bros. & Co. of October 16, 1839. Works, vol. 6, p. 537. "The security for state loans," he said, "is the plighted faith of the estate as a political community. It rests on the same basis as other contracts with established governments,—the same basis, for example, as loans made by the United States under the authority of congress; that is to say, the good faith of the government making the loan, and its ability to fulfil its engagements." In Briscoe v. Bank, 11 Pet. 257, 321, Mr. Justice MCLEAN, delivering the opinion of the court, said: "What means of enforcing payment from the state had the holder of a bill of credit? It is said by the counsel for the plaintiff that he could have sued the state. But was a state liable to be sued? * * * No sovereign state is liable to be sued without her consent. Under the articles of confederation, a state could be sued only in cases of boundary. It is believed that there is no case where a suit has been brought, at any time, on bills of credit against a state; and it is certain that no suit could have been maintained, on this ground, prior to the constitution." "It may be accepted as a point of departure unquestioned," said Mr. Justice MILLER in Cunningham v. Railroad Co., 109 U. S. 446, 451, 3 Sup. Ct. Rep. 292, "that neither a state nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a state may be made a party in the supreme court of the United States by virtue of the original jurisdiction conferred on this court by the constitution."

Undoubtedly a state may be sued by its own consent, as was the case in Curran v. Arkansas, 15 How. 304, 309, and in Clark v. Barnard, 108 U. S. 436, 447, 2 Sup. Ct. Rep. 878. The suit in the former case was prosecuted by virtue of a state law which the legislature passed in conformity to the constitution of that state. But this court decided, in Beers v. Arkansas, 20 How. 527, that the state could repeal that law at any a time; that it was not a contract within the terms of the constitution prohibiting the passage of state laws impairing the obligation of a contract. In that case the law allowing the state to be sued was modified pending certain suits against the state on its bonds, so as to require the bonds to be filed in court, which was objected to as an unconstitutional change of the law. Chief Justice TANEY, delivering the opinion of the court, said: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another state. And, as this permission is altogether voluntary on the part of the sovereignty, it

follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it. * * * The prior law was not a contract. It was an ordinary act of legislation, prescribing the conditions upon which the state consented to waive the privilege of sovereignty. It contained no stipulation that these regulations should not be modified afterwards if, upon experience, it was found that further provisions were necessary to protect the public interest; and no such contract can be implied from the law, nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the state, if they had thought proper to do so, or prescribe new conditions upon which the suits might still be allowed to proceed. In exercising this latter power the state violated no contract with the parties." The same doctrine was held in Railroad Co. v. Tennessee, 101 U. S. 337, 339; Railroad Co. v. Alabama, Id. 832; and In re Ayers, 123 U. S. 443, 505, 8 Sup.Ct. Rep. 164.

But besides the presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the constitution,—anomalous and unheard of when the constitution was adopted,—an additional reason why the jurisdiction claimed for the circuit court does not exist is the language of the act of congress by which its jurisdiction is conferred. The words are these: "The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, * * * arising under the constitution or laws of the United States, or treaties," etc. "Concurrent with the courts of the several states." Does not this qualification show that congress, in legislating to carry the constitution into effect, did not intend to invest its courts with any new and strange jurisdictions? The state courts have no power to entertain suits by individuals against a state without its consent. Then how does the circuit court, having only concurrent jurisdiction, acquire any such power? It is true that the same qualification existed in the judiciary act of 1789, which was before the court in Chisholm v. Georgia, and the majority of the court did not think that it was sufficient to limit the jurisdiction of the circuit court. Justice IREDELL thought differently. In view of the manner in which that decision was received by the country, the adoption of the eleventh amendment, the light of history, and the reason of the thing, we think we are at liberty to prefer Justice IREDELL's views in this regard.

Some reliance is placed by the plaintiff upon the observations of Chief Justice MARSHALL in Cohens v. Virginia, 6 Wheat. 264, 410. The chief justice was there considering the power of review exercisable by this court over the judgments of a state court, wherein it might be necessary to make the state itself a defendant in error. He showed that this power was absolutely necessary in order to enable the judiciary of the United States to take cognizance of all cases arising under the constitution and laws of the United States. He also showed that making a state a defendant in error was entirely different from suing a state in an original action in prosecution of a demand against it, and was not within the meaning of the eleventh amendment; that the prosecution of a writ of error against a state was not the prosecution of a suit in the sense of that amendment, which had reference to the prosecution by suit of claims against a state. "Where," said the chief justice, "a state obtains a judgment against an individual, and the court rendering such judgment overrules a defense set up under the constitution or laws of the United States, the transfer of this record into the supreme court, for the sole purpose of inquiring whether the judgment violates the constitution or laws of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the state whose judgment is so far re-examined. Nothing is demanded from the state. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. * * * He only asserts the constitutional right to have his defense examined by that tribunal whose province it is to construe the constitution and laws of the Union. * * * The point of view in which this writ of error, with its citation, has been considered uniformly in the courts of the Union, has been well illustrated by a reference to the course of this court in suits instituted by the United States. The universally received opinion is that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior court. * * * It has never been suggested that such writ of error was a suit against the United States, and therefore not within the jurisdiction of the appellate court." After thus showing by incontestable argument that a writ of error to a judgment recovered by a state, in which the state is necessarily the defendant in error, is not a suit commenced or prosecuted against a state in the sense of the amendment, he added that, if the court were mistaken in this, its error did not affect that case, because the writ of error therein was not prosecuted by "a citizen of another state" or "of any foreign state," and so was not affected by the amendment, but was governed by the general grant of judicial power, as extending "to all cases arising under the constitution or laws of the United States, without respect to parties." Page 412.

It must be conceded that the last observation of the chief justice does favor the argument of the plaintiff. But the observation was unnecessary to the decision, and in that sense extrajudicial, and, though made by one who seldom used

words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion. With regard to the question then before the court, it may be observed that writs of error to judgments in favor of the crown, or of the state, had been known to the law from time immemorial, and had never been considered as exceptions to the rule that an action does not lie against the sovereign. To avoid misapprehension, it may be proper to add that, although the obligations of a state rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the state consents to be sued or comes itself into court, yet, where property or rights are enjoyed under a grant or contract made by a state, they cannot wantonly be invaded. While the state cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts may be judicially resisted, and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment. It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign state from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a state represents its polity and its will, and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent, (of which the legislature, and not the courts, is the judge,) never fails in the end to incur the odium of the world, and to bring lasting injury upon the state itself. But to deprive the legislature of the power of judging what the honor and safety of the state may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause. The judgment of the circuit court is affirmed.

HARLAN, J. I concur with the court in holding that a suit directly against a state by one of its own citizens is not one to which the judicial power of the United States extends, unless the state itself consents to be sued. Upon this ground alone I assent to the judgment. But I cannot give my assent to many things said in the opinion. The comments made upon the decision in Chisholm v. Georgia do not meet my approval. They are not necessary to the determination of the present case. Besides, I am of opinion that the decision in that case was based upon a sound interpretation of the constitution as that instrument then was.

UNITED STATES v. STATE OF TEXAS.[1]

(12 Sup. Ct. 488, 143 U. S. 621.)

Supreme Court of the United States. Feb. 29, 1892.

In equity.

Edgar Allan, Special Asst. Atty. Gen., for the United States. A. H. Garland, John Hancock, George Clark, H. J. May, and C. A. Culberson, for the State of Texas.

Mr. Justice HARLAN delivered the opinion of the court.

This suit was brought by original bill in this court pursuant to the act of May 2, 1890, providing a temporary government for the territory of Oklahoma. The 25th section recites the existence of a controversy between the United States and the state of Texas as to the ownership of what is designated on the map of Texas as "Greer County," and provides that the act shall not be construed to apply to that county until the title to the same has been adjudicated and determined to be in the United States. In order that there might be a speedy and final judicial determination of this controversy the attorney general of the United States was authorized and directed to commence and prosecute on behalf of the United States a proper suit in equity in this court against the state of Texas, setting forth the title of the United States to the country lying between the North and South Forks of the Red river where the Indian Territory and the state of Texas adjoin, east of the 100th degree of longitude, and claimed by the state of Texas as within its boundary. 26 St. pp. 81, 92, c. 182, § 25.

The state of Texas appeared and filed a demurrer, and also an answer denying the material allegations of the bill. The case is now before the court only upon the demurrer, the principal grounds of which are that the question presented is political in its nature and character, and not susceptible of judicial determination by this court in the exercise of its jurisdiction as conferred by the constitution and laws of the United States; that it is not competent for the general government to bring suit against a state of the Union in one of its own courts, especially when the right to be maintained is mutually asserted by the United States and the state, namely, the ownership of certain designated territory; and that the plaintiff's cause of action, being a suit to recover real property, is legal, and not equitable, and consequently so much of the act of May 2, 1890, as authorizes and directs the prosecution of a suit in equity to determine the rights of the United States to the territory in question is unconstitutional and void.

The necessity of the present suit as a measure of peace between the general government and the state of Texas, and the nature and importance of the questions raised by the demurrer, will appear from a statement of the principal facts disclosed by the bill and amended bill.

By a treaty between the United States and Spain, made February 22, 1819, and ratified February 19, 1821, it was provided:

"Art. 3. The boundary line between the two countries, west of the Mississippi, shall begin on the Gulf of Mexico, at the mouth of the river Sabine, in the sea, continuing north, along the western bank of that river, to the thirty-second degree of latitude; thence, by a line due north, to the degree of latitude where it strikes the Rio Roxo of Natchitoches or Red river; then following the course of the Rio Roxo, westward, to the degree of longitude 100 west from London and 23 from Washington; then, crossing the said Red river, and running thence, by a line due north, to the river Arkansas; thence, following the course of the southern bank of the Arkansas, to its source, in latitude 42 north; and thence, by that parallel of latitude, to the South Sea. The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the 1st of January, 1818. But, if the source of the Arkansas river shall be found to fall north or south of latitude 42, then the line shall be run from the said source due south or north, as the case may be, till it meets the said parallel of latitude 42, and thence, along the said parallel, to the South Sea. All the islands in the Sabine and the said Red and Arkansas rivers, throughout the course thus described, to belong to the United States; but the use of the waters, and the navigation of the Sabine to the sea, and of the said rivers Roxo and Arkansas, throughout the extent of the said boundary, on their respective banks, shall be common to the respective inhabitants of both nations.

"The two high contracting parties agree to cede and renounce all their rights, claims, and pretensions to the territories described by said line; that is to say, the United States hereby cede to his Catholic majesty, and renounce forever, all their rights, claims, and pretensions to the territories lying west and south of the above-described line; and, in like manner, his Catholic majesty cedes to the said United States all his rights, claims, and pretensions to any territories east and north of the said line, and for himself, his heirs, and successors, renounces all claim to the said territories forever." 8 St. pp. 252, 254, 256, art. 3.

For the purpose of fixing the line with precision, and of placing landmarks to designate the limits of both nations, it was stipulated that each appoint a commissioner and a surveyor, who should meet, before the end of one year from the ratification of the treaty, at Natchitoches, on the Red river, and run and mark the line "from the mouth of the Sabine to the Red river, and from the Red river to the river Arkansas, and to ascertain the latitude of the source of the said river Arkansas, in conformity to what is above agreed upon and stipulated, and the line of latitude 42, to the South Sea;" making out plans and keeping journals of their proceedings, and the result to be considered as part of the treaty, having the

[1] Dissenting opinion of Mr. Chief Justice Fuller omitted.

same force as if it had been inserted therein. Article 4, 8 St. p. 256.

At the date of the ratification of this treaty the country now constituting Texas belonged to Mexico, part of the monarchy of Spain. Subsequently, in 1824, Mexico became a separate, independent power, whereby the boundary line designated in the treaty of 1819 became the line between the United States and Mexico.

On the 12th of January, 1828, a treaty between the United States and Mexico was concluded, and subsequently, April 5, 1832, was ratified, whereby, as between those governments, the validity of the limits defined by the treaty of 1819 was confirmed. 8 St. p. 372.

By a treaty concluded April 25, 1838, between the United States and the republic of Texas, which was ratified and proclaimed October 12 and 13, 1838, it was declared that the treaty of limits made and concluded in 1828 between the United States and Mexico "is binding upon the republic of Texas;" and in order to prevent future disputes and collisions in regard to the boundary between the two countries, as designated by the treaty of 1828, it was stipulated:

"Article 1. Each of the contracting parties shall appoint a commissioner and surveyor, who shall meet, before the termination of twelve months from the exchange of the ratification of this convention, at New Orleans, and proceed to run and mark that portion of the said boundary which extends from the mouth of the Sabine, where that river enters the Gulf of Mexico, to the Red river. They shall make out plans and keep journals of their proceedings, and the result agreed upon by them shall be considered as part of this convention, and shall have the same force as if it were inserted therein. * * *

"Art. 2. And it is agreed that, until this line is marked out, as is provided for in the foregoing article, each of the contracting parties shall continue to exercise jurisdiction in all territory over which its jurisdiction has hitherto been exercised, and that the remaining portion of the said boundary line shall be run and marked at such time hereafter as may suit the convenience of both the contracting parties, until which time each of the said parties shall exercise, without the interference of the other, within the territory of which the boundary shall not have been so marked and run, jurisdiction to the same extent to which it has been heretofore usually exercised." 8 St. p. 511.

The treaty of 1838 had not been executed on the 1st day of March, 1845, when congress, by joint resolution, consented that "the territory properly included within, and rightfully belonging to, the republic of Texas, may be erected into a new state," upon certain conditions. 5 St. p. 797. Those conditions having been accepted, Texas, by a joint resolution of congress, passed December 29, 1845, was admitted into the Union on an equal footing with the original states in all respects whatever. 9 St. p. 108.

By an act of congress approved September 9, 1850, certain propositions were made on behalf of the United States to the state of Texas, to become obligatory upon the parties when accepted by Texas, if such acceptance was given on or before December 1, 1850. One of those propositions was that Texas would agree that its boundary on the north should commence at the point at which the meridian of 100 degrees west from Greenwich is intersected by the parallel of 36 degrees 30 minutes north latitude, and run from that point due west to the meridian of 103 degrees west from Greenwich; thence due south to the thirty-second degree of north latitude; thence, on the parallel of 32 degrees of north latitude, to the Rio Bravo del Norte; and thence with the channel of said river to the Gulf of Mexico,—another, that Texas cede to the United States all her claim to territory exterior to the above limits and boundaries. In consideration of said establishment of boundaries, cession of claim to territory, and relinquishment of claims, the United States agreed to pay to Texas the sum of $10,000,000 in a stock bearing 5 per cent. interest, and redeemable at the end of 14 years, the interest payable half-yearly at the treasury of the United States. 9 St. p. 446, c. 49.

By an act of assembly approved November 25, 1850, the above propositions were accepted by Texas, and it agreed to be bound by them according to their true import.

During the whole period of nearly 40 years succeeding the treaty of 1819, no action, except as above indicated, was taken to settle the boundary line in question. But in the year 1859 a joint commission on the part of the United States and Texas commenced the work of running that line, but separated without reaching any conclusion. Nevertheless, in 1860 the commissioner upon the part of the United States completed the work, without the co-operation of the commissioner of Texas, and reported the result to the general land-office in 1861. According to the determination of the commissioner on the part of the United States, and under certain surveys made from 1857 to 1859, pursuant to a contract between two persons named Jones and Brown and the commissioner of Indian affairs, the true dividing and boundary line between the United States and the United Mexican States began where the 100th meridian touched the main Red river aforesaid, running thence along the line or course of what is now known as the "South Fork of the Red River," or "River of the Treaty of 1819."

After the commissioners of the United States and Texas had failed to reach an agreement the legislature of Texas, by an act approved February 8, 1860, declared "that all the territory contained in the following limits, to-wit: Beginning at the confluence of Red river and Prairie Dog river; thence running up Red river, passing the mouth of South Fork and following main or North Red river to its intersection with the twenty-third degree of west longitude; thence due north across Salt Fork and Prairie Dog river, and thence following that river to the place of beginning,—be, and the same is hereby, created into a county to be known by the

name and style of the 'County of Greer.'" And by acts of its officers, proceeding under its statutes, Texas assumed and exercised control and jurisdiction of the territory constituting what is called the "County of Greer."

Notwithstanding those assertions of control and jurisdiction, Texas, by an act approved May 2, 1882, made provision for running and marking the line in question. That act provided for the appointment by the governor of a suitable person or persons who, in conjunction with such person or persons as might be appointed by or on behalf of the United States for the same purpose, should run and mark the boundary line between the territories of the United States and the state of Texas, in order that "the question may be definitely settled as to the true location of the one hundredth degree of longitude west from London, and whether the North Fork of Red river, or the Prairie Dog Fork of said river, is the true Red river designated in the treaty between the United States and Spain, made February 22, 1819."

By an act of congress, approved January 31, 1885, provision was made for the appointment of a commission by the president to act with the commission to be appointed by the state of Texas in ascertaining and marking the point where the 100th meridian of longitude crosses Red river, in accordance with the terms of the treaty of 1819; the person or persons so appointed to make report of his or their action in the premises to the secretary of the interior, who should transmit the same to congress at its next session after the report was made. 23 St. p. 296, c. 47.

Under the last-mentioned acts a joint commission was organized, and it assembled at Galveston, Tex., on February 23, 1886. Being unable to agree as to whether the stream now known as the "North Fork of the Red River," or that now called the "South Fork or Main Red River," was the river referred to in the treaty of 1819, the joint commission adjourned *sine die* with the understanding that each commission would make its report to the proper authorities and await instructions. The commissioners on the part of the United States reported that "the Prairie Dog Town Fork is the true boundary, and that the monument should be placed at the intersection of the one hundredth meridian with this stream," while the commission on the part of Texas reported that "the North Fork of Red river, as now named and delineated on the maps, is the Rio Roxo or Red River delineated on Melish's maps described in the treaty of February 22, 1819, and is the boundary line of said treaty to the point where the one hundredth degree of west longitude crosses the same."

The United States claims to have jurisdiction over all the territory acquired by the treaty of 1819, containing 1,511,576.17 acres, between what has been designated as the "Prairie Dog Town Fork, or Main Red River," and the North Fork of Red river, being the extreme portion of the Indian Territory lying west of the North Fork of the Red river, and east of the one-hundredth meridian of west longitude from Greenwich, and that its right to said territory, so far from having been relinquished, has been continuously asserted from the ratification of the treaty of 1819 to the present time.

The bill alleges that the state of Texas, without right, claims, has taken possession of, and endeavors to extend its laws and jurisdiction over, the disputed territory, in violation of the treaty rights of the United States; that, during the year 1887, it gave public notice of its purpose to survey and place upon the market for sale, and otherwise dispose of, that territory; and that, in consequence of its proceeding to eject *bona fide* settlers from certain portions thereof, President Cleveland, by proclamation issued December 30, 1887, warned all persons, whether claiming to act as officers of the county of Greer or otherwise, against selling or disposing of, or attempting to sell or dispose of, any of said lands, or from exercising or attempting to exercise any authority over them, and "against purchasing any part of said territory from any person or persons whatever." 25 St. p. 1483.

The relief asked is a decree determining the true line between the United States and the state of Texas, and whether the land constituting what is called "Greer County" is within the boundary and jurisdiction of the United States or of the state of Texas. The government prays that its rights, as asserted in the bill, be established, and that it have such other relief as the nature of the case may require.

In support of the contention that the ascertainment of the boundary between a territory of the United States and one of the states of the Union is political in its nature and character, and not susceptible of judicial determination, the defendant cites Foster v. Neilson, 2 Pet. 253, 307, 309; Cherokee Nation v. Georgia, 5 Pet. 1, 21; U. S. v. Arredondo, 6 Pet. 691, 711; and Garcia v. Lee, 12 Pet. 511, 517.

In Foster v. Neilson, which was an action to recover certain lands in Louisiana, the controlling question was as to whom the country between the Iberville and the Perdido rightfully belonged at the time the title of the plaintiff in that case was acquired. The United States, the court said, had perseveringly insisted that by the treaty of St. Ildefonso, made October 1, 1800, Spain ceded the disputed territory as part of Louisiana to France, and that France, by the treaty of Paris of 1803, ceded it to the United States. Spain insisted that the cession to France comprehended only the territory which at that time was denominated "Louisiana." After examining various articles of the treaty of St. Ildefonso, Chief Justice MARSHALL, speaking for the court, said: "In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by their own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably the right remains with the strongest. The judiciary is not that department of the government to which

the assertion of its interests against foreign powers is confided; and its duty, commonly, is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous." Again: "After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted,—it is not in its own courts that this construction is to be denied. A question like this, respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion the courts of every country must respect the pronounced will of the legislature."

In U. S. v. Arredondo the court, referring to Foster v. Neilson, said: "This court did not deem the settlement of boundaries a judicial, but a political, question; that it was not its duty to lead, but to follow, the action of the other departments of the government." The same principles were recognized in Cherokee Nation v. Georgia and Garcia v. Lee.

These authorities do not control the present case. They relate to questions of boundary between independent nations, and have no application to a question of that character arising between the general government and one of the states composing the Union, or between two states of the Union. By the articles of confederation, congress was made "the last resort on appeal in all disputes and differences" then subsisting or which thereafter might arise "between two or more states concerning boundary, jurisdiction, or any other cause whatever;" the authority so conferred to be exercised by a special tribunal to be organized in the mode prescribed in those articles, and its judgment to be final and conclusive. Article 9. At the time of the adoption of the constitution, there existed, as this court said in Rhode Island v. Massachusetts, 12 Pet. 657, 723, 724, controversies between 11 states, in respect to boundaries, which had continued from the first settlement of the colonies. The necessity for the creation of some tribunal for the settlement of these and like controversies that might arise, under the new government to be formed, must, therefore, have been perceived by the framers of the constitution; and consequently, among the controversies to which the judicial power of the United States was extended by the constitution, we find those between two or more states. And that a controversy between two or more states, in respect to boundary, is one to which, under the constitution, such judicial power extends, is no longer an open question in this court. The cases of Rhode Island v. Massachusetts, 12 Pet. 657; New Jersey v. New York, 5 Pet. 284, 290; Missouri v. Iowa, 7 How. 660; Florida v. Georgia, 17 How. 478; Alabama v. Georgia, 23 How. 505; Virginia v. West Virginia, 11 Wall. 39, 55; Missouri v. Kentucky, 11 Wall. 395; Indiana v. Kentucky, 136 U. S. 479, 10 Sup. Ct. Rep. 1051; and Nebraska v. Iowa, 143 U. S. 359, 12 Sup. Ct. Rep. 396,—were all original suits in this court for the judicial determination of disputed boundary lines between states. In New Jersey v. New York, 5 Pet. 284, 290, Chief Justice MARSHALL said: "It has then been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a state, under the authority conferred by the constitution and existing acts of congress." And, in Virginia v. West Virginia, it was said by Mr. Justice MILLER to be the established doctrine of this court "that it has jurisdiction of questions of boundary between two states of this Union, and that this jurisdiction is not defeated because, in deciding that question, it becomes necessary to examine into and construe compacts or agreements between those states, or because the decree which the court may render affects the territorial limits of the political jurisdiction and sovereignty of the states which are parties to the proceeding." So, in Wisconsin v. Insurance Co., 127 U. S. 265, 287, 288, 8 Sup. Ct. Rep. 1370: "By the constitution, therefore, this court has original jurisdiction of suits brought by a state against citizens of another state, as well as of controversies between two states. * * * As to 'controversies between two or more states,' the most numerous class of which this court has entertained jurisdiction is that of controversies between two states as to the boundaries of their territory, such as were determined before the Revolution by the king, in council, and under the articles of confederation (while there was no national judiciary) by committees or commissioners appointed by congress."

In view of these cases, it cannot with propriety be said that a question of boundary between a territory of the United States and one of the states of the Union is of a political nature, and not susceptible of judicial determination by a court having jurisdiction of such a controversy. The important question, therefore, is whether this court can, under the constitution, take cognizance of an original suit brought by the United States against a state to determine the boundary between one of the territories and such state. Texas insists that no such jurisdiction has been conferred upon this court, and that the only mode in which the present dispute can be peaceably settled is by agreement, in some form, between the United States and that state. Of course, if no such agreement can be reached,—and it seems that one is not probable,—and if neither party will surrender its claim of authority and jurisdiction over the disputed territory, the re-

suit, according to the defendant's theory of the constitution, must be that the United States, in order to effect a settlement of this vexed question of boundary, must bring its suit in one of the courts of Texas,—that state consenting that its courts may be opened for the assertion of claims against it by the United States,—or that in the end there must be a trial of physical strength between the government of the Union and Texas. The first alternative is unwarranted both by the letter and spirit of the constitution. Mr. Justice Story has well said: "It scarcely seems possible to raise a reasonable doubt as to the propriety of giving to the national courts jurisdiction of cases in which the United States are a party. It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts. Unless this power were given to the United States, the enforcement of all their rights, powers, contracts, and privileges in their sovereign capacity would be at the mercy of the states. They must be enforced, if at all, in the state tribunals." Story, Const. § 1674. The second alternative above mentioned has no place in our constitutional system, and cannot be contemplated by any patriot except with feelings of deep concern.

The cases in this court show that the framers of the constitution did provide by that instrument for the judicial determination of all cases in law and equity between two or more states, including those involving questions of boundary. Did they omit to provide for the judicial determination of controversies arising between the United States and one or more of the states of the Union? This question is, in effect, answered by U. S. v. North Carolina, 136 U. S. 211, 10 Sup. Ct. Rep. 920. That was an action of debt brought in this court by the United States against the state of North Carolina upon certain bonds issued by that state. The state appeared, the case was determined here upon its merits, and judgment was rendered for the state. It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a state. As, however, the question of jurisdiction is vital in this case, and is distinctly raised, it is proper to consider it upon its merits.

The constitution extends the judicial power of the United States "to all cases, in law and equity, arising under this constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof and foreign states, citizens, or subjects. In all cases affecting ambassadors, or other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make." Article 3, § 2. "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." 11th Amend.

It is apparent upon the face of these clauses that in one class of cases the jurisdiction of the courts of the Union depends "on the character of the cause, whoever may be the parties," and in the other, on the character of the parties, whatever may be the subject of controversy. Cohens v. Virginia, 6 Wheat. 264, 378, 393. The present suit falls in each class; for it is, plainly, one arising under the constitution, laws, and treaties of the United States, and also one in which the United States is a party. It is therefore one to which, by the express words of the constitution, the judicial power of the United States extends. That a circuit court of the United States has not jurisdiction, under existing statutes, of a suit by the United States against a state, is clear; for by the Revised Statutes it is declared —as was done by the judiciary act of 1789 —that "the supreme court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction." Rev. St. § 687; Act Sept. 24, 1789, c. 20, § 13; 1 St. p. 80. Such exclusive jurisdiction was given to this court because it best comported with the dignity of a state that a case in which it was a party should be determined in the highest, rather than in a subordinate, judicial tribunal of the nation. Why, then, may not this court take original cognizance of the present suit, involving a question of boundary between a territory of the United States and a state?

The words in the constitution, "in all cases * * * in which a state shall be party, the supreme court shall have original jurisdiction," necessarily refer to all cases mentioned in the preceding clause in which a state may be made of right a party defendant, or in which a state may of right be a party plaintiff. It is admitted that these words do not refer to suits brought against a state by its own citizens or by citizens of other states, or by citizens or subjects of foreign states, even where such suits arise under the constitution, laws, and treaties of the United States, because the judicial power of the United States does not extend to suits of individuals against states. Hans v. Louisiana, 134 U. S. 1, 10 Sup. Ct. Rep. 504,

and authorities there cited; North Carolina v. Temple, 134 U. S. 22, 30, 10 Sup. Ct. Rep. 509. It is, however, said that the words last quoted refer only to suits in which a state is a party, and in which, also, the opposite party is another state of the Union or a foreign state. This cannot be correct, for it must be conceded that a state can bring an original suit in this court against a citizen of another state. Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 287, 8 Sup. Ct. Rep. 1370. Besides, unless a state is exempt altogether from suit by the United States, we do not perceive upon what sound rule of construction suits brought by the United States in this court—especially if they be suits, the correct decision of which depends upon the constitution, laws, or treaties of the United States—are to be excluded from its original jurisdiction as defined in the constitution. That instrument extends the judicial power of the United States "to all cases," in law and equity, arising under the constitution, laws, and treaties of the United States, and to controversies in which the United States shall be a party, and confers upon this court original jurisdiction "in all cases" "in which a state shall be party;" that is, in all cases mentioned in the preceding clause in which a state may of right be made a party defendant, as well as in all cases in which a state may of right institute a suit in a court of the United States. The present case is of the former class. We cannot assume that the framers of the constitution, while extending the judicial power of the United States to controversies between two or more states of the Union, and between a state of the Union and foreign states, intended to exempt a state altogether from suit by the general government. They could not have overlooked the possibility that controversies capable of judicial solution might arise between the United States and some of the states, and that the permanence of the Union might be endangered if to some tribunal was not intrusted the power to determine them according to the recognized principles of law. And to what tribunal could a trust so momentous be more appropriately committed than to that which the people of the United States, in order to form a more perfect Union, establish justice, and insure domestic tranquillity, have constituted with authority to speak for all the people and all the states upon questions before it to which the judicial power of the nation extends? It would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more states, but not jurisdiction of controversies of like character between the United States and a state.

Mr. Justice BRADLEY, speaking for the court in Hans v. Louisiana, 134 U. S. 1, 13, 15, 10 Sup. Ct. Rep. 504, referred to what had been said by certain statesmen at the time the constitution was under submission to the people, and said:

"The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a state. * * * The truth is that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between states as to boundary lines, and other questions admitting of judicial solution. And yet the case of Penn v. Lord Baltimore, 1 Ves. Sr. 444, shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times; and several cases of the same general character arose under the articles of confederation, and were brought before the tribunal provided for that purpose in those articles. 131 U. S. Append. 50. The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the states." That case, and others in this court relating to the suability of states, proceeded upon the broad ground that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."

The question as to the suability of one government by another government rests upon wholly different grounds. Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the states. The submission to judicial solution of controversies arising between these two governments, "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other," (McCulloch v. State of Maryland, 4 Wheat. 316, 400, 410,) but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. The states of the Union have agreed, in the constitution, that the judicial power of the United States shall extend to all cases arising under the constitution, laws, and treaties of the United States, without regard to the character of the parties, (excluding, of course, suits against a state by its own citizens or by citizens of other states, or by citizens or subjects of foreign states,) and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases "in which a state shall be party," without excluding those in which the United States may be the opposite party. The exercise, therefore, by this court, of such original jurisdiction in a suit brought by one state against another to determine the boundary line between them, or in a suit brought by the United States against a state to determine the boundary between a territory of the United States and that state, so far from infringing in either case upon the sovereignty, is with the consent of the state sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other states.

We are of opinion that this court has

jurisdiction to determine the disputed question of boundary between the United States and Texas.

It is contended that, even if this court has jurisdiction, the dispute as to boundary must be determined in an action at law, and that the act of congress requiring the institution of this suit in equity is unconstitutional and void, as, in effect, declaring that legal rights shall be tried and determined as if they were equitable rights. This is not a new question in this court. It was suggested in argument, though not decided, in Fowler v Lindsey, 3 Dall. 411, 413. Mr. Justice WASHINGTON, in that case, said: "I will not say that a state could sue at law for such an incorporeal right as that of sovereignty and jurisdiction; but, even if a court of law would not afford a remedy, I can see no reason why a remedy should not be obtained in a court of equity. The state of New York might, I think, file a bill against the state of Connecticut, praying to be quieted as to the boundaries of the disputed territory; and this court, in order to effectuate justice, might appoint commissioners to ascertain and report those boundaries." But the question arose directly in Rhode Island v. Massachusetts, 12 Pet. 657, 734, which was a suit in equity in this court involving the boundary line between two states. The court said: "No court acts differently in deciding on boundary between states than on lines between separate tracts of land. If there is uncertainty where the line is,—if there is a confusion of boundaries by the nature of interlocking grants, the obliteration of marks, the intermixing of possession under different proprietors, the effects of accident, fraud, or time, or other kindred causes,—it is a case appropriate to equity. An issue at law is directed, a commission of boundary awarded; or, if the court are satisfied without either, they decree what and where the boundary of a farm, a manor, province, or state is and shall be." When that case was before the court at a subsequent term, Chief Justice TANEY, after stating that the case was of peculiar character, involving a question of boundary between two sovereign states, litigated in a court of justice, and that there were no precedents as to forms and modes of proceedings, said: "The subject was, however, fully considered at January term, 1838, when a motion was made by the defendant to dismiss this bill. Upon that occasion the court determined to frame their proceedings according to those which had been adopted in the English courts in cases most analogous to this, where the boundaries of great political bodies had been brought into question; and, acting upon this principle, it was then decided that the rules and practice of the court of chancery should govern in conducting this suit to a final issue. The reasoning upon which that decision was founded is fully stated in the opinion then delivered; and, upon re-examining the subject, we are quite satisfied as to the correctness of this decision." 14 Pet. 210, 256. The above cases (New Jersey v. New York, Missouri v. Iowa, Florida v. Georgia, Alabama v. Georgia, Virginia v. West Virginia, Missouri v. Kentucky, Indiana v. Kentucky, and Nebraska v. Iowa) were all original suits in equity in this court, involving the boundary of states. In view of these precedents, it is scarcely necessary for the court to examine this question anew. Of course, if a suit in equity is appropriate for determining the boundary between two states, there can be no objection to the present suit as being in equity and not at law. It is not a suit simply to determine the legal title to, and the ownership of, the lands constituting Greer county. It involves the larger question of governmental authority and jurisdiction over that territory. The United States, in effect, asks the specific execution of the terms of the treaty of 1819, to the end that the disorder and public mischiefs that will ensue from a continuance of the present condition of things may be prevented. The agreement, embodied in the treaty, to fix the lines with precision, and to place landmarks to designate the limits of the two contracting nations, could not well be enforced by an action at law. The bill and amended bill make a case for the interposition of a court of equity.

Demurrer overruled.

Mr. Chief Justice FULLER and Mr. Justice LAMAR dissented.

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CUNNINGHAM, Sheriff, v. NEAGLE.[1]

(10 Sup. Ct. 658, 135 U. S. 1.)

Supreme Court of the United States. April 14, 1890.

G. A. Johnson, Atty. Gen. Cal., *S. Shellabarger*, *J. M. Wilson*, and *Z. Montgomery*, for appellant. *W. H. H. Miller*, Atty. Gen., *Jos. H. Choate*, and *Jas. C. Carter*, for appellee.

MILLER, J. This is an appeal by Cunningham, sheriff of the county of San Joaquin, in the state of California, from a judgment of the circuit court of the United States for the northern district of California, discharging David Neagle from the custody of said sheriff, who held him a prisoner on a charge of murder. On the 16th day of August, 1889, there was presented to Judge SAWYER, the circuit judge of the United States for the ninth circuit, embracing the northern district of California, a petition signed, "DAVID NEAGLE, Deputy United States Marshal," by A. L. Farish on his behalf. This petition represented that the said Farish was a deputy-marshal duly appointed for the northern district of California by J. C. Franks, who was the marshal of that district. It further alleged that David Neagle was, at the time of the occurrences recited in the petition, and at the time of filing it, a duly-appointed and acting deputy United States marshal for the same district. It then proceeded to state that said Neagle was imprisoned, confined, and restrained of his liberty in the county jail in San Joaquin county, in the state of California, by Thomas Cunningham, sheriff of said county, upon a charge of murder, under a warrant of arrest, a copy of which was annexed to the petition. The warrant was as follows:

"In the justice's court of Stockton township. State of California, county of San Joaquin—ss.: The people of the state of California to any sheriff, constable, marshal, or policeman of said state, or of the county of San Joaquin: Information on oath having been this day laid before me by Sarah A. Terry that the crime of murder, a felony, has been committed within said county of San Joaquin on the 14th day of August, A. D. 1889, in this, that one David S. Terry, a human being then and there being, was willfully, unlawfully, feloniously, and with malice aforethought, shot, killed, and murdered, and accusing Stephen J. Field and David Neagle thereof, you are therefore commanded forthwith to arrest the above-named Stephen J. Field and David Neagle, and bring them before me, at my office in the city of Stockton, or, in case of my absence or inability to act, before the nearest and most accessible magistrate in the county. Dated at Stockton this 14th day of August, A. D. 1889. H. V. J. SWAIN, Justice of the Peace.

"The defendant, David Neagle, having been brought before me on this warrant, is committed for examination to the sheriff of San Joaquin county, California. Dated August 15, 1889. H. V. J. SWAIN, Justice of the Peace."

The petition then recites the circumstances of a rencounter between said Neagle and David S. Terry, in which the latter was instantly killed by two shots from a revolver in the hands of the former. The circumstances of this encounter, and of what led to it, will be considered with more particularity hereafter. The main allegation of this petition is that Neagle, as United States deputy-marshal, acting under the orders of Marshal Franks, and in pursuance of instructions from the attorney general of the United States, had, in consequence of an anticipated attempt at violence on the part of Terry against the Honorable STEPHEN J. FIELD, a justice of the supreme court of the United States, been in attendance upon said justice, and was sitting by his side at a breakfast table when a murderous assault was made by Terry on Judge FIELD, and in defense of the life of the judge the homicide was committed for which Neagle was held by Cunningham. The allegation is very distinct that Justice FIELD was engaged in the discharge of his duties as circuit justice of the United States for that circuit, having held court at Los Angeles, one of the places at which the court is by law held, and, having left that court, was on his way to San Francisco for the purpose of holding the circuit court at that place. The allegation is also very full that Neagle was directed by Marshal Franks to accompany him for the purpose of protecting him, and that these orders of Franks were given in anticipation of the assault which actually occurred. It is also stated, in more general terms, that Marshal Neagle, in killing Terry under the circumstances, was in the discharge of his duty as an officer of the United States, and was not, therefore, guilty of a murder, and that his imprisonment under the warrant held by Sheriff Cunningham is in violation of the laws and constitution of the United States, and that he is in custody for an act done in pursuance of the laws of the United States. This petition being sworn to by Farish and presented to Judge SAWYER, he made the following order: "Let a writ of *habeas corpus* issue in pursuance of the prayer of the within petition, returnable before the United States circuit court for the northern district of California. SAWYER, Circuit Judge." The writ was accordingly issued and delivered to Cunningham, who made the following return: "County of San Joaquin, State of California. Sheriff's Office. To the honorable circuit court of the United States for the Northern District of California: I hereby certify and return that before the coming to me of the annexed writ of *habeas corpus* the said David Neagle was committed to my custody, and is detained by me by virtue of a warrant issued out of the justice's court of Stockton township, state of California, county of San Joaquin, and by the indorsement made upon said warrant. Copy of said warrant and indorsement is annexed hereto, and made a part of this return. Nevertheless, I have the body of the said David Neagle before the honorable court, as I am in the said writ commanded. August 17,

[1] Dissenting opinion of Mr. Justice Lamar omitted.

1889. THOS. CUNNINGHAM, Sheriff San Joaquin County, California." Various pleadings and amended pleadings were made, which do not tend much to the elucidation of the matter before us. Cunningham filed a demurrer to the petition for the writ of *habeas corpus;* and Neagle filed a traverse to the return of the sheriff, which was accompanied by exhibits, the substance of which will be hereafter considered, when the case comes to be examined upon its facts.

The hearing in the circuit court was had before Circuit Judge SAWYER and District Judge SABIN. The sheriff, Cunningham, was represented by G. A. Johnson, attorney general of the state of California, and other counsel. A large body of testimony, documentary and otherwise, was submitted to the court, on which, after a full consideration of the subject, the court made the following order: "In the matter of David Neagle. On *habeas corpus*. In the above-entitled matter, the court, having heard the testimony introduced on behalf of the petitioner, none having been offered for the respondent, and also the arguments of the counsel for petitioner and respondent, and it appearing to the court that the allegations of the petitioner in his amended answer or traverse to the return of the sheriff of San Joaquin county, respondent herein, are true, and that the prisoner is in custody for an act done in pursuance of a law of the United States, and in custody in violation of the constitution and laws of the United States, it is therefore ordered that petitioner be, and he is hereby, discharged from custody." From that order an appeal was allowed, which brings the case to this court, accompanied by a voluminous record of all the matters which were before the court on the hearing.

If it be true, as stated in this order of the court discharging the prisoner, that he was held "in custody for an act done in pursuance of a law of the United States, and in custody in violation of the constitution and laws of the United States," there does not seem to be any doubt that, under the statute on that subject, he was properly discharged by the circuit court. Section 753 of the Revised Statutes reads as follows: "The writ of *habeas corpus*[2] shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the constitution, or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify." And section 761 declares that when, by the writ of *habeas corpus*, the petitioner is brought up for a hearing, the "court or justice or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." This, of course, means that if he is held in custody in violation of the constitution or a law of the United States, or for an act done or omitted in pursuance of a law of the United States, he must be discharged.

By the law, as it existed at the time of the enactment of the Revised Statutes, an appeal could be taken to the circuit court from any court of justice or judge inferior to the circuit court in a certain class of *habeas corpus* cases. But there was no appeal to the supreme court in any case except where the prisoner was the subject or citizen of a foreign state, and was committed or confined under the authority or law of the United States, or of any state, on account of any act done or omitted to be done under the commission or authority of a foreign state, the validity of which depended upon the law of nations. But afterwards, by the act of congress of March 3, 1885, (23 St. 437,) this was extended by amendment as follows: "That section seven hundred and sixty-four of the Revised Statutes be amended so that the same shall read as follows: 'From the final decision of such circuit court an appeal may be taken to the supreme court in the cases described in the preceding section.'" The preceding section here referred to is section 763[3] and is the one on which the prisoner relies for his discharge from custody in this case. It will be observed that in both the provisions of the Revised Statutes and of this latter act of congress the mode of review, whether by the circuit court of the judgment of an inferior court or justice or judge, or by this court of the judgment of a circuit court, the word "appeal," and not "writ of error," is used; and, as congress has always used these words with a clear understanding of what is meant by them, namely, that by a writ of error only questions of law are brought up for review, as in actions at common law, while by an appeal, except when specially provided otherwise, the entire case, on both law and facts, is to be reconsidered, there seems to be little doubt that, so far as it is essential to a proper decision of this case, the appeal requires us to examine into the evidence brought to sustain or defeat the right of the petitioner to his discharge.

The history of the incidents which led to the tragic event of the killing of Terry by the prisoner, Neagle, had its origin in a suit brought by William Sharon, of Nevada, in the circuit court of the United States for the district of California, against Sarah Althea Hill, alleged to be a citizen of California, for the purpose of obtaining a decree adjudging a certain instrument

[2] Rev. St. U. S. §§ 751, 752, give power to the supreme court, the circuit and district courts, and the several justices and judges of said courts to issue writs of habeas corpus.

[3] Section 763 provides, among other cases, for the issuing of writs of habeas corpus by the circuit courts on petition of persons alleged to be restrained of their liberty in violation of the constitution or laws of the United States.

in writing possessed and exhibited by her, purporting to be a declaration of marriage between them under the Code of California, to be a forgery, and to have it set aside and annulled. This suit, which was commenced October 3, 1883, was finally heard before Judge SAWYER, the circuit judge for that circuit, and Judge DEADY, United States district judge for Oregon, who had been duly appointed to assist in holding the circuit court for the district of California. The hearing was on September 29, 1885, and on the 15th of January, 1886, a decree was rendered granting the prayer of the bill. In that decree it was declared that the instrument purporting to be a declaration of marriage, set out and described in the bill of complaint, "was not signed or executed at any time by William Sharon, the complainant; that it is not genuine; that it is false, counterfeited, fabricated, forged, and fraudulent, and, as such, is utterly null and void. And it is further ordered and decreed that the respondent, Sarah Althea Hill, deliver up and deposit with the clerk of the court said instrument, to be indorsed 'Canceled,' and that the clerk write across it, 'Canceled,' and sign his name and affix his seal thereto." The rendition of this decree was accompanied by two opinions; the principal one being written by Judge DEADY, and a concurring one by Judge SAWYER. They were very full in their statement of the fraud and forgery practiced by Miss Hill, and stated that it was also accompanied by perjury; and, inasmuch as Mr. Sharon had died between the hearing of the argument of the case, on the 29th of September, 1885, and the time of rendering this decision, January 15, 1886, an order was made setting forth that fact, and declaring that the decree was entered as of the date of the hearing, *nunc pro tunc*.

Nothing was done under this decree. The defendant, Sarah Althea Hill, did not deliver up the instrument to the clerk to be canceled, but she continued to insist upon its use in the state court. Under these circumstances, Frederick W. Sharon, as the executor of the will of his father, William Sharon, filed in the circuit court for the northern district of California, on March 12, 1888, a bill of revivor, stating the circumstances of the decree, the death of his father, and that the decree had not been performed; alleging, also, the intermarriage of Miss Hill with David S. Terry, of the city of Stockton, in California, and making the said Terry and wife parties to this bill of revivor. The defendants both demurred and answered, resisting the prayer of the plaintiff, and denying that the petitioner was entitled to any relief. This case was argued in the circuit court before FIELD, circuit justice, SAWYER, circuit judge, and SABIN, district judge. While the matter was held under advisement, Judge SAWYER, on returning from Los Angeles, in the southern district of California, where he had been holding court, found himself on the train as it left Fresno, which is understood to have been the residence of Terry and wife, in a car in which he noticed that Mr. and Mrs. Terry were in a section behind him, on the same side. On this trip from Fresno to San Francisco, Mrs. Terry grossly insulted Judge SAWYER, and had her husband change seats so as to sit directly in front of the judge, while she passed him with insolent remarks, and pulled his hair with a vicious jerk, and then, in an excited manner, taking her seat by her husband's side, said: "I will give him a taste of what he will get by and by. Let him render this decision if he dares,"—the decision being the one already mentioned, then under advisement. Terry then made some remark about too many witnesses being in the car, adding that "the best thing to do with him would be to take him out into the bay, and drown him." These incidents were witnessed by two gentlemen who knew all the parties, and whose testimony is found in the record before us. This was August 14, 1888. On the 3d of September the court rendered its decision granting the prayer of the bill of revivor in the name of Frederick W. Sharon and against Sarah Althea Terry and her husband, David S. Terry. The opinion was delivered by Mr. Justice FIELD, and during its delivery a scene of great violence occurred in the court-room. It appears that shortly before the court opened on that day, both the defendants in the case came into the court-room and took seats within the bar at the table next the clerk's desk, and almost immediately in front of the judges. Besides Mr. Justice FIELD, there were present on the bench Judge SAWYER and Judge SABIN, of the district court of the United States for the district of Nevada. The defendants had denied the jurisdiction of the court originally to render the decree sought to be revived, and the opinion of the court necessarily discussed this question, without reaching the merits of the controversy. When allusion was made to this question, Mrs. Terry arose from her seat, and, addressing the justice who was delivering the opinion, asked, in an excited manner, whether he was going to order her to give up the marriage contract to be canceled. Mr. Justice FIELD said: "Be seated, madam." She repeated the question, and was again told to be seated. She then said, in a very excited and violent manner, that Justice FIELD had been bought, and wanted to know the price he had sold himself for; that he had got Newland's money for it, and everybody knew that he had got it, or words to that effect. Mr. Justice FIELD then directed the marshal to remove her from the court-room. She asserted that she would not go from the room, and that no one could take her from it. Marshal Franks proceeded to carry out the order of the court by attempting to compel her to leave, when Terry, her husband, arose from his seat under great excitement, exclaiming that no man living should touch his wife, and struck the marshal a blow in his face so violent as to knock out a tooth. He then unbuttoned his coat, thrust his hand under his vest, apparently for the purpose of drawing a bowie-knife, when he was seized by persons present, and forced down on his back. In the meantime Mrs. Terry was removed from the court-room by the marshal, and Terry was allowed to rise, and was accompanied by officers to the door leading to the marshal's office. As he was about

leaving the room, or immediately after being out of it, he succeeded in drawing a bowie-knife, when his arms were seized by a deputy-marshal and others present to prevent him from using it; and they were able to wrench it from him only after a severe struggle. The most prominent person engaged in wresting the knife from Terry was Neagle, the prisoner now in court. For this conduct both Terry and his wife were sentenced by the court to imprisonment for contempt,—Mrs. Terry for one month, and Terry for six months; and these sentences were immediately carried into effect. Both the judgment of the court on the petition for the revival of the decree in the case of Sharon against Hill, and the judgment of the circuit court imprisoning Terry and wife for contempt, have been brought to this court for review; and in both cases the judgments have been affirmed. The report of the cases may be found in Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. Rep. 77, and Terry v. Sharon, 131 U. S. 40, 9 Sup. Ct. Rep. 705. Terry and Mrs. Terry were separately indicted by the grand jury of the circuit court of the United States, during the same term, for their part in these transactions; and the cases were pending in said court at the time of Terry's death. It also appears that Mrs. Terry, during her part of this altercation in the court room, was making efforts to open a small satchel which she had with her, but through her excitement she failed. This satchel, which was taken from her, was found to have in it a revolving pistol.

From that time until his death the denunciations by Terry and his wife of Mr. Justice FIELD were open, frequent, and of the most vindictive and malevolent character. While being transported from San Francisco to Alameda, where they were imprisoned, Mrs. Terry repeated a number of times that she would kill both Judge FIELD and Judge SAWYER. Terry, who was present, said nothing to restrain her, but added that he was not through with Judge FIELD yet; and, while in jail at Alameda, Terry said that after he got out of jail he would horsewhip Judge FIELD, and that he did not believe he would ever return to California, but this earth was not large enough to keep him from finding Judge FIELD and horsewhipping him; and, in reply to a remark that this would be a dangerous thing to do, and that Judge FIELD would resent it, he said: "If Judge FIELD resents it, I will kill him." And while in jail Mrs. Terry exhibited to a witness Terry's knife, at which he laughed, and said, "Yes, I always carry that," and made a remark about judges and marshals, that "they were all a lot of cowardly curs," and he would "see some of them in their graves yet." Mrs. Terry also said that she expected to kill Judge FIELD some day. Perhaps the clearest expression of Terry's feelings and intentions in the matter was in a conversation with Mr. Thomas T. Williams, editor of one of the daily newspapers of California. This interview was brought about by a message from Terry requesting Williams to call and see him. In speaking of the occurrences in the court, he said that Justice FIELD had put a lie in the record about him, and when he met Field he would have to take that back, "and if he did not take it back, and apologize for having lied about him, he would slap his face or pull his nose." "I said to him," said the witness, "'Judge Terry, would not that be a dangerous thing to do? Justice FIELD is not a man who would permit any one to put a deadly insult upon him, like that.' He said, 'Oh, Field won't fight.' I said: 'Well, judge, I have found nearly all men will fight. Nearly every man will fight when there is occasion for it, and Judge FIELD has had a character in this state of having the courage of his convictions, and being a brave man.' At the conclusion of that branch of the conversation, I said to him: 'Well, Judge FIELD is not your physical equal, and if any trouble should occur he would be very likely to use a weapon.' He said: 'Well, that's as good a thing as I want to get.' The whole impression conveyed to me by this conversation was that he felt he had some cause of grievance against Judge FIELD; that he hoped they might meet, that he might have an opportunity to force a quarrel upon him, and he would get him into a fight." Mr. Williams says that after the return of Justice FIELD to California, in the spring or summer of 1889, he had other conversations with Terry, in which the same vindictive feelings of hatred were manifested and expressed by him. It is useless to go over the testimony on this subject more particularly. It is sufficient to say that the evidence is abundant that both Terry and wife contemplated some attack upon Judge FIELD during his official visit to California in the summer of 1889, which they intended should result in his death. Many of these matters were published in the newspapers, and the press of California was filled with the conjectures of a probable attack by Terry on Justice FIELD as soon as it became known that he was going to attend the circuit court in that year.

So much impresssed were the friends of Judge FIELD, and of public justice, both in California and in Washington, with the fear that he would fall a sacrifice to the resentment of Terry and his wife, that application was made to the attorney general of the United States suggesting the propriety of his furnishing some protection to the judge while in California. This resulted in a correspondence between the attorney general of the United States, the district attorney, and the marshal of the northern district of California on that subject. This correspondence is here set out:

"Department of Justice, Washington, April 27th, 1889. John C. Franks, United States Marshal, San Francisco, Cal.—Sir: The proceedings which have heretofore been had in connection with the case of Mr. and Mrs. Terry in your United States circuit court have become matter of public notoriety, and I deem it my duty to call your attention to the propriety of exercising unusual caution, in case further proceedings shall be had in that case, for the protection of his honor, Justice FIELD, or whoever may be called upon to hear and determine the matter. Of course, I do not know what may be the feelings or purpose of Mr. and Mrs. Terry in the premises, but

many things which have happened indicate that violence on their part is not impossible. It is due to the dignity and independence of the court, and the character of its judge, that no effort on the part of the government shall be spared to make them feel entirely safe and free from anxiety in the discharge of their high duties. You will understand, of course, that this letter is not for the public, but to put you upon your guard. It will be proper for you to show it to the district attorney if deemed best. Yours, truly, W. H. H. MILLER, Attorney General."

"United States Marshal's Office, Northern District of California, San Francisco, May 6, 1889. Hon. W. H. H. Miller, Attorney General, Washington, D. C.—Sir: Yours of the 27th ultimo at hand. When the Hon. Judge LORENZO SAWYER, our circuit judge, returned from Los Angeles, some time before the celebrated court scene, and informed me of the disgraceful action of Mrs. Terry towards him on the cars while her husband sat in front, smilingly approving it, I resolved to watch the Terrys, (and so notified my deputies,) whenever they should enter the court-room, to be ready to suppress the very first indignity offered by either of them to the judges. After this, at the time of their ejectment from the court-room, when I held Judge Terry and his wife as prisoners in my private office, and heard his threats against Justice FIELD, I was more fully determined than ever to throw around the justice and Judge SAWYER every safeguard I could. I have given the matter careful consideration, with the determination to fully protect the federal judges at this time, trusting that the department will reimburse me for any reasonable expenditure. I have always, whenever there is any likelihood of either Judge or Mrs. Terry appearing in court, had a force of deputies with myself on hand to watch their every action. You can rest assured that when Justice FIELD arrives he, as well as all the federal judges, will be protected from insults, and where an order is made it will be executed without fear as to consequences. I shall follow your instructions, and act with more than usual caution. I have already consulted with the United States attorney, J. T. Carey, Esq., as to the advisability of making application to you, at the time the Terrys are tried upon criminal charges, for me to select two or more detectives to assist in the case, and also assist me in protecting Justice FIELD while in my district. I wish the judges to feel secure, and for this purpose will see to it that their every wish is promptly obeyed. I notice your remarks in regard to the publicity of your letter, and will obey your request. I shall only be too happy to receive any suggestions from you at any time. The opinion among the better class of citizens here is very bitter against the Terrys, though, of course, they have their friends, and, unfortunately, among that class it is necessary to watch. Your most obedient servant, J. C. FRANKS, U. S. Marshal, Northern Dist. of Cal."

"San Francisco, Cal., May 7, 1889. Hon. W. H. H. Miller, U. S. Attorney General, Washington, D. C.—Dear Sir: Marshal Franks exhibited to me your letter bearing date the 27th ult., addressed to him upon the subject of using due caution by way of protecting Justice FIELD and the federal judges here in the discharge of their duties in matters in which the Terrys are interested. I noted your suggestion with a great degree of pleasure, not because our marshal is at all disposed to leave anything undone within his authority or power to do, but because it encouraged him to know and feel that the head of our department was in full sympathy with the efforts being made to protect the judges, and vindicate the dignity of our courts. I write merely to suggest that there is just reason, in the light of the past and the threats made by Judge and Mrs. Terry against Justice FIELD and Judge SAWYER, to apprehend personal violence at any moment and at any place, as well in court as out of court, and that, while due caution has always been taken by the marshal when either Judge or Mrs. Terry is about the building in which the courts are held, he has not felt it within his authority to guard either Judge SAWYER or Justice FIELD against harm when away from the appraisers' building. Discretion dictates, however, that a protection should be thrown about them at other times and places, when proceedings are being had before them in which the Terrys are interested; and I verily believe, in view of the direful threats made against Justice FIELD, that he will be in great danger at all times while here. Mr. Franks is a prudent, cool, and courageous officer, who will not abuse any authority granted him. I would therefore suggest that he be authorized, in his discretion, to retain one or more deputies, at such times as he may deem necessary, for the purposes suggested. That publicity may not be given to the matter, it is important that the deputies whom he may select be not known as such; and, that efficient service may be assured for the purposes indicated, it seems to me that they should be strangers to the Terrys. The Terrys are unable to appreciate that an officer should perform his official duty when that duty in any way requires his efforts to be directed against them. The marshal, his deputies, and myself suffer daily indignities and insults from Mrs. Terry, in court and out of court, committed in the presence of her husband, and without interference upon his part. I do not purpose being deterred from any duty, nor do I purpose being intimidated in the least degree from doing my whole duty in the premises; but I shall feel doubly assured in being able to do so knowing that our marshal has your kind wishes and encouragement in doing everything needed to protect the officers of the court in the discharge of their duties. This, of course, is not intended for the public files of your office, nor will it be on file in my office. Prudence dictates great caution on the part of the officials who may be called upon to have anything to do in the premises, and I deem it to be of the greatest importance that the suggestions back and forth be confidential. I shall write you further upon the subject of these cases in a few

days. I have the honor to be your most obedient servant, JOHN T. CAREY, U. S. Attorney."

"Department of Justice, Washington, D. C., May 27, 1889. J. C. Franks, Esq., United States Marshal, San Francisco, Cal.—Sir: Referring to former correspondence of the department relating to a possible disorder in the session of the approaching term of court, owing to the small number of bailiffs under your control to preserve order, you are directed to employ certain special deputies at a *per diem* of five dollars, payable out of the appropriation for fees and expenses of marshals, to be submitted to the court, as a separate account from your other accounts against the government, for approval, under section 846, Revised Statutes, as an extraordinary expense, that the same may be forwarded to this department in order to secure executive action and approval. Very respectfully, W. H. H. MILLER, Attorney General."

The result of this correspondence was that Marshal Franks appointed Mr. Neagle a deputy-marshal for the northern district of California, and gave him special instructions to attend upon Judge FIELD both in court and while going from one court to another, and protect him from any assault that might be attempted upon him by Terry and wife. Accordingly, when Judge FIELD went from San Francisco to Los Angeles, to hold the circuit court of the United States at that place, Mr. Neagle accompanied him, remained with him for the few days that he was engaged in the business of that court, and returned with him to San Francisco. It appears from the uncontradicted evidence in the case that, while the sleeping-car in which were Justice FIELD and Mr. Neagle stopped a moment, in the early morning, at Fresno, Terry and wife got on the train. The fact that they were on the train became known to Neagle, and he held a conversation with the conductor as to what peace-officers could be found at Lathrop, where the train stopped for breakfast; and the conductor was requested to telegraph to the proper officers of that place to have a constable or some peace-officer on the ground when the train should arrive, anticipating that there might be violence attempted by Terry upon Judge FIELD. It is sufficient to say that this resulted in no available aid to assist in keeping the peace. When the train arrived, Neagle informed Judge FIELD of the presence of Terry on the train, and advised him to remain, and take his breakfast in the car. This the judge refused to do, and he and Neagle got out of the car, and went into the dining-room, and took seats beside each other in the place assigned them by the person in charge of the breakfast-room; and very shortly after this Terry and wife came into the room, and Mrs. Terry, recognizing Judge FELD, turned and left in great haste, while Terry passed beyond where Judge FIELD and Neagle were, and took his seat at another table. It was afterwards ascertained that Mrs. Terry went to the car, and took from it a satchel in which was a revolver. Before she returned to the eating-room, Terry arose from his seat, and, passing around the table in such a way as brought him behind Judge FIELD, who did not see him or notice him, came up where he was sitting with his feet under the table, and struck him a blow on the side of his face, which was repeated on the other side. He also had his arm drawn back and his fist doubled up, apparently to strike a third blow, when Neagle, who had been observing him all this time, arose from his seat with his revolver in his hand, and in a very loud voice shouted out: "Stop! stop! I am an officer!" Upon this Terry turned his attention to Neagle, and, as Neagle testifies, seemed to recognize him, and immediately turned his hand to thrust it in his bosom, as Neagle felt sure, with the purpose of drawing a bowie-knife. At this instant Neagle fired two shots from his revolver into the body of Terry, who immediately sank down, and died in a few minutes. Mrs. Terry entered the room, with the satchel in her hand, just after Terry sank to the floor. She rushed up to the place where he was, threw herself upon his body, made loud exclamations and moans, and commenced inviting the spectators to avenge her wrong upon Field and Neagle. She appeared to be carried away by passion, and in a very earnest manner charged that Field and Neagle had murdered her husband intentionally; and shortly afterwards she appealed to the persons present to examine the body of Terry to see that he had no weapons. This she did once or twice. The satchel which she had, being taken from her, was found to contain a revolver. These are the material circumstances produced in evidence before the circuit court on the hearing of this *habeas corpus* case. It is but a short sketch of a history which is given in over 500 pages in the record, but we think it is sufficient to enable us to apply the law of the case to the question before us. Without a more minute discussion of this testimony, it produces upon us the conviction of a settled purpose on the part of Terry and his wife, amounting to a conspiracy, to murder Justice FIELD; and we are quite sure that if Neagle had been merely a brother or a friend of Judge FIELD, traveling with him, and aware of all the previous relations of Terry to the judge,—as he was,—of his bitter animosity, his declared purpose to have revenge even to the point of killing him, he would have been justified in what he did in defense of Mr. Justice FIELD's life, and possibly of his own.

But such a justification would be a proper subject for consideration on a trial of the case for murder in the courts of the state of California; and there exists no authority in the courts of the United States to discharge the prisoner while held in custody by the state authorities for this offense, unless there be found in aid of the defense of the prisoner some element of power and authority asserted under the government of the United States. This element is said to be found in the facts that Mr. Justice FIELD, when attacked, was in the immediate discharge of his duty as judge of the circuit courts of the United States within California; that the assault upon him grew out of the animosity of Terry and wife, arising out of

the previous discharge of his duty as circuit justice in the case, for which they were committed for contempt of court; and that the deputy-marshal of the United States who killed Terry in defense of Field's life, was charged with a duty, under the law of the United States, to protect Field from the violence which Terry was inflicting, and which was intended to lead to Field's death. To the inquiry whether this proposition is sustained by law and the facts which we have recited, we now address ourselves.

Mr. Justice FIELD was a member of the supreme court of the United States, and had been a member of that court for over a quarter of a century, during which he had become venerable for his age and for his long and valuable service in that court. The business of the supreme court has become so exacting that for many years past the justices of it have been compelled to remain for the larger part of the year in Washington city, from whatever part of the country they may have been appointed. The term for each year, including the necessary travel and preparations to attend at its beginning, has generally lasted from eight to nine months. But the justices of this court have imposed upon them other duties, the most important of which arise out of the fact that they are also judges of the circuit courts of the United States. Of these circuits there are nine, to each one of which a justice of the supreme court is allotted, under section 606 of the Revised Statutes, the provision of which is as follows: "The chief justice and associate justices of the supreme court shall be allotted among the circuits by an order of the court; and a new allotment shall be made whenever it becomes necessary or convenient, by reason of the alteration of any circuit, or of the new appointment of a chief justice or associate justice, or otherwise." Section 610 declares that it "shall be the duty of the chief justice and of each justice of the supreme court to attend at least one term of the circuit court in each district of the circuit to which he is allotted during every period of two years." Although this enactment does not require, in terms, that the justices shall go to their circuits more than once in two years, the effect of it is to compel most of them to do this, because there are so many districts in many of the circuits that it is impossible for the circuit justice to reach them all in one year; and the result of this is that he goes to some of them in one year, and to others in the next year, thus requiring an attendance in the circuit every year. The justices of the supreme court have been members of the circuit courts of the United States ever since the organization of the government; and their attendance on the circuit, and appearance at the places where the courts are held, has always been thought to be a matter of importance. In order to enable him to perform this duty, Mr. Justice FIELD had to travel each year from Washington city, near the Atlantic coast, to San Francisco, on the Pacific coast. In doing this, he was as much in the discharge of a duty imposed upon him by law as he was while sitting in court and trying causes. There are many duties which the judge performs outside of the court-room where he sits to pronounce judgment or to preside over a trial. The statutes of the United States, and the established practice of the courts, require that the judge perform a very large share of his judicial labors at what is called "chambers." This chamber work is as important, as necessary, as much a discharge of his official duty, as that performed in the court-house. Important cases are often argued before the judge at any place convenient to the parties concerned, and a decision of the judge is arrived at by investigations made in his own room, wherever he may be; and it is idle to say that this is not as much the performance of judicial duty as the filing of the judgment with the clerk, and the announcement of the result in open court. So it is impossible for a justice of the supreme court of the United States, who is compelled by the obligations of duty to be so much in Washington city, to discharge his duties of attendance on the circuit courts, as prescribed by section 610, without traveling, in the usual and most convenient modes of doing it, to the place where the court is to be held. This duty is as much an obligation imposed by the law as if it had said in words: "The justices of the supreme court shall go from Washington city to the place where their terms are held every year." Justice FIELD had not only left Washington, and traveled the 3,000 miles or more which was necessary to reach his circuit, but he had entered upon the duties of that circuit, had held the court at San Francisco for some time, and, taking a short leave of that court, had gone down to Los Angeles, another place where a court was to be held, and sat as a judge there for several days, hearing cases and rendering decisions. It was in the necessary act of returning from Los Angeles to San Francisco, by the usual mode of travel between the two places, where his court was still in session, and where he was required to be, that he was assaulted by Terry in the manner which we have already described.

The occurrence which we are called upon to consider was of so extraordinary a character that it is not to be expected that many cases can be found to cite as authority upon the subject. In the case of U. S. v. The Little Charles, 1 Brock. 380,[4] a question arose before Chief Justice MARSHALL, holding the circuit court of the United States for Virginia, as to the validity of an order made by the district judge at his chambers, and not in court. The act of congress authorized stated terms of the district court, and gave the judge power to hold special courts, at his discretion, either at the place appointed by the law, or such other place in the district as the nature of the business and his discretion should direct. He says: "It does not seem to be a violent construction of such an act to consider the judge as constituting a court whenever he proceeds on judicial business;" and cites the practice of the courts in support of that view of the sub-

[4] Fed. Cas. No. 15,613.

ject. In the case of U. S. v. Gleason, 1 Woolw. 128,[5] the prisoner was indicted for the murder of two enrolling officers who were charged with the duty of arresting deserters, or those who had been drafted into the service and had failed to attend. These men, it was said, had visited the region of country where they were murdered, and, having failed of accomplishing their purpose of arresting the deserters, were on their return to their home when they were killed; and the court was asked to instruct the jury that under these circumstances they were not engaged in the duty of arresting the deserters named. "It is claimed by the counsel for the defendant," says the report, "that if the parties killed had been so engaged, and had come to that neigborhood with the purpose of arresting the supposed deserters, but at the moment of the assault had abandoned the intention of making the arrests at that time, and were returning to headquarters at Grinnell with a view to making other arrangements for arrest at another time, they were not so engaged as to bring the case within the law." But the court held that this was not a sound construction of the statute, and "that if the parties killed had come into that neighborhood with intent to arrest the deserters named, and had been employed by the proper officer for that service, and were, in the proper prosecution of that purpose, returning to Grinnell with a view to making other arrangements to discharge this duty, they were still engaged in arresting deserters, within the meaning of the statute. It is not necessary," said the court, "that the party killed should be engaged in the immediate act of arrest, but it is sufficient if he be employed in and about that business when assaulted. The purpose of the law is to protect the life of the person so employed, and this protection continues so long as he is engaged in a service necessary and proper to that employment." We have no doubt that Mr. Justice FIELD, when attacked by Terry, was engaged in the discharge of his duties as circuit justice of the ninth circuit, and was entitled to all the protection, under those circumstances, which the law could give him.

It is urged, however, that there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge FIELD in the present case, and, indeed, no protection whatever against a vindictive or malicious assault growing out of the faithful discharge of his official duties; and that the language of section 753 of the Revised Statutes, that the party seeking the benefit of the writ of *habeas corpus* must, in this connection, show that he is "in custody for an act done or omitted in pursuance of a law of the United States," makes it necessary that upon this occasion it should be shown that the act for which Neagle is imprisoned was done by virtue of an act of congress. It is not supposed that any special act of congress exists which authorizes the marshals or deputy-marshals of the United States, in express terms, to accompany the judges of the supreme court through their circuits, and act as a bodyguard to them, to defend them against malicious assaults against their persons. But we are of opinion that this view of the statute is an unwarranted restriction of the meaning of a law designed to extend in a liberal manner the benefit of the writ of *habeas corpus* to persons imprisoned for the performance of their duty; and we are satisfied that, if it was the duty of Neagle, under the circumstances,—a duty which could only arise under the laws of the United States,—to defend Mr. Justice FIELD from a murderous attack upon him, he brings himself within the meaning of the section we have recited. This view of the subject is confirmed by the alternative provision that he must be in custody "for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or a judge thereof, or is in custody in violation of the constitution or of a law or treaty of the United States." In the view we take of the constitution of the United States, any obligation fairly and properly inferable from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is a "law," within the meaning of this phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably. It has in modern times become apparent that the physical health of the community is more efficiently promoted by hygienic and preventive means than by the skill which is applied to the cure of disease after it has become fully developed. So, also, the law, which is intended to prevent crime, in its general spread among the community, by regulations, police organization, and otherwise, which are adapted for the protection of the lives and property of citizens, for the dispersion of mobs, for the arrest of thieves and assassins, for the watch which is kept over the community, as well as over this class of people, is more efficient than punishment of crimes after they have been committed. If a person in the situation of Judge FIELD could have no other guaranty of his personal safety while engaged in the conscientious discharge of a disagreeable duty than the fact that, if he was murdered, his murderer would be subject to the laws of a state, and by those laws could be punished, the security would be very insufficient. The plan which Terry and wife had in mind, of insulting him and assaulting him, and drawing him into a defensive physical contest, in the course of which they would slay him, shows the little value of such remedies. We do not believe that the government of the United States is thus inefficient, or that its constitution and laws have left the high officers of the government so defenseless and unprotected.

The views expressed by this court, through Mr. Justice BRADLEY, in Ex parte Siebold, 100 U. S. 371, 394, are very pertinent to this subject, and express our views

[5] Fed. Cas. No. 15,216.

with great force. That was a case of a writ of *habeas corpus*, where Siebold had been indicted in the circuit court of the United States for the district of Maryland for an offense committed against the election laws during an election at which members of congress and officers of the state of Maryland were elected. He was convicted, and sentenced to fine and imprisonment, and filed his petition in this court for a writ of *habeas corpus*, to be relieved on the ground that the court which had convicted him was without jurisdiction. The foundation of this allegation was that the congress of the United States had no right to prescribe laws for the conduct of the election in question, or for enforcing the laws of the state of Maryland by the courts of the United States. In the course of the discussion of the relative powers of the federal and state courts on this subject, it is said: "Somewhat akin to the argument which has been considered is the objection that the deputy-marshals authorized by the act of congress to be created, and to attend the elections, are authorized to keep the peace, and that this is a duty which belongs to the state authorities alone. It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the states. Here, again, we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to execute its functions in all places does not derogate from the power of the state to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case the words of the constitution itself show which is to yield. 'This constitution, and all laws which shall be made in pursuance thereof, * * * shall be the supreme law of the land.' * * * Without the concurrent sovereignty referred to, the national government would be nothing but an advisory government. Its executive power would be absolutely nullified. Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the process of the courts, must they call on the nearest constable for protection? Must they rely on him to use the requisite compulsion, and to keep the peace, whilst they are soliciting and entreating the parties and by-standers to allow the law to take its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the national government out of the United States, and relegate it to the District of Columbia, or perhaps to some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old confederation. * * * It must execute its powers, or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have power to command obedience, preserve order, and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction." At the same term of the court, in the case of Tennessee v. Davis, 100 U. S. 257, 262, where the same questions in regard to the relative powers of the federal and state courts were concerned, in regard to criminal offenses, the court expressed its views through Mr. Justice STRONG, quoting from the case of Martin v. Hunter, 1 Wheat. 363, the following language: "The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers," and then proceeding: "It can act only through its officers and agents, and they must act within the states. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court for an alleged offense against the law of the state, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the state court,—the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a state may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government and in obedience to its laws. It may deny the authority conferred by those laws. The state court may administer not only the laws of the state, but equally federal law, in such a manner as to paralyze the operations of the government; and even if, after trial and final judgment in the state court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested. We do not think such an element of weakness is to be found in the constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the states and upon the people of the states. While it is limited in the number of its powers, so far as its sovereignty extends, it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it."

To cite all the cases in which this principle of the supremacy of the government of the United States in the exercise of all the powers conferred upon it by the constitu-

tion is maintained, would be an endless task. We have selected these as being the most forcible expressions of the views of the court, having a direct reference to the nature of the case before us. Where, then, are we to look for the protection which we have shown Judge FIELD was entitled to when engaged in the discharge of his official duties? Not to the courts of the United States, because, as has been more than once said in this court, in the division of the powers of government between the three great departments, executive, legislative, and judicial, the judicial is the weakest for the purposes of self-protection, and for the enforcement of the powers which it exercises. The ministerial officers through whom its commands must be executed are marshals of the United States, and belong emphatically to the executive department of the government. They are appointed by the president, with the advice and consent of the senate. They are removable from office at his pleasure. They are subjected by act of congress to the supervision and control of the department of justice, in the hands of one of the cabinet officers of the president, and their compensation is provided by acts of congress. The same may be said of the district attorneys of the United States who prosecute and defend the claims of the government in the courts. The legislative branch of the government can only protect the judicial officers by the enactment of laws for that purpose, and the argument we are now combating assumes that no such law has been passed by congress. If we turn to the executive department of the government, we find a very different condition of affairs. The constitution, § 3, art. 2, declares that the president "shall take care that the laws be faithfully executed;" and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the senate, to appoint the most important of them, and to fill vacancies. He is declared to be the commander in chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the constitution, and the creation by acts of congress, of executive departments, which have varied in number from four or five to seven or eight, who are familiarly called "cabinet ministers." These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called; and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed." Is this duty limited to the enforcement of acts of congress or of treaties of the United States according to their express terms; or does it include the rights, duties, and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the constitution?

One of the most remarkable episodes in the history of our foreign relations, and which has become an attractive historical incident, is the case of Martin Koszta, a native of Hungary, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen. While in Smyrna he was seized by command of the Austrian consul-general at that place, and carried on board the Hussar, an Austrian vessel, where he was held in close confinement. Capt. Ingraham, in command of the American sloop of war St. Louis, arriving in port at that critical period, and ascertaining that Koszta had with him his naturalization papers, demanded his surrender to him, and was compelled to train his guns upon the Austrian vessel before his demands were complied with. It was, however, to prevent bloodshed, agreed that Koszta should be placed in the hands of the French consul subject to the result of diplomatic negotiations between Austria and the United States. The celebrated correspondence between Mr. Marcy, secretary of state, and Chevalier Hulsemann, the Austrian minister at Washington, which arose out of this affair, and resulted in the release and restoration to liberty of Koszta, attracted a great deal of public attention; and the position assumed by Mr. Marcy met the approval of the country and of congress, who voted a gold medal to Capt. Ingraham for his conduct in the affair. Upon what act of congress then existing can any one lay his finger in support of the action of our government in this matter?

So, if the president or the postmaster general is advised that the mails of the United States, possibly carrying treasure, are liable to be robbed, and the mail carriers assaulted and murdered, in any particular region of country, who can doubt the authority of the president, or of one of the executive departments under him, to make an order for the protection of the mail, and of the persons and lives of its carriers, by doing exactly what was done in the case of Mr. Justice FIELD, namely, providing a sufficient guard, whether it be by soldiers of the army or by marshals of the United States, with a *posse comitatus* properly armed and equipped, to secure the safe performance of the duty of carrying the mail wherever it may be intended to go?

The United States is the owner of millions of acres of valuable public land, and has been the owner of much more, which it has sold. Some of these lands owe a large part of their value to the forests which grow upon them. These forests are liable to depredations by people living in the neighborhood, known as "timber thieves," who make a living by cutting and selling such timber, and who are trespassers. But until quite recently, even if there be one now, there was no statute authorizing any preventive measures for the protection of this valuable public property. Has the president no authority to place guards upon the public territory to protect its timber? No authority to seize the timber when cut and found upon the ground? Has he no power to take any measures to protect this vast domain? Fortunately, we find this question an-

swered by this court in the case of Wells v. Nickles, 104 U. S. 444. That was a case in which a class of men appointed by local land-officers, under instructions from the secretary of the interior, having found a large quantity of this timber cut down from the forests of the United States, and lying where it was cut, seized it. The question of the title to this property coming in controversy between Wells and Nickles, it became essential to inquire into the authority of these timber agents of the government, thus to seize the timber cut by trespassers on its lands. The court said: "The effort we have made to ascertain and fix the authority of these timber agents by any positive provision of law has been unsuccessful." But the court, notwithstanding there was no special statute for it, held that the department of the interior, acting under the idea of protecting from depredation timber on the lands of the government, had gradually come to assert the right to seize what is cut and taken away from them wherever it can be traced, and in aid of this the registers and receivers of the land-office had, by instructions from the secretary of the interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. And the court upheld the authority of the secretary of the interior to make these rules and regulations for the protection of the public lands.

One of the cases in this court in which this question was presented in the most imposing form is that of U. S. v. Tin Co., 125 U. S. 273, 8 Sup. Ct. Rep. 850. In that case a suit was brought in the name of the United States, by order of the attorney general, to set aside a patent which had been issued for a large body of valuable land, on the ground that it was obtained from the government by fraud and deceit practiced upon its officers. A preliminary question was raised by counsel for defendant, which was earnestly insisted upon, as to the right of the attorney general or any other officer of the government to institute such a suit in the absence of any act of congress authorizing it. It was conceded that there was no express authority given to the attorney general to institute that particular suit, or any suit of that class. The question was one of very great interest, and was very ably argued both in the court below and in this court. The response of this court to that suggestion conceded that in the acts of congress establishing the department of justice and defining the duties of the attorney general there was no such express authority; and it was said that there was also no express authority to him to bring suits against debtors of the government upon bonds, or to begin criminal prosecutions, or to institute criminal proceedings in any of the cases in which the United States was plaintiff, yet he was invested with the general superintendence of all such suits. It was further said: "If the United States, in any particular case, has a just cause for calling upon the judiciary of the country, in any of its courts, for relief, by setting aside or annulling any of its contracts, its obligations, or its most solemn instruments, the question of the appeal to the judicial tribunals of the country must primarily be decided by the attorney general of the United States. That such a power should exist somewhere, and that the United States should not be more helpless in relieving itself from frauds, impostures, and deceptions than the private individual, is hardly open to argument. * * * There must, then, be an officer or officers of the government to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases. The attorneys of the United States in every judicial district are officers of this character, and they are by statute under the immediate supervision and control of the attorney general. How, then, can it be argued that if the United States has been deceived, entrapped, or defrauded into the making, under the forms of law, of an instrument which injuriously affects its rights of property, or other rights, it cannot bring a suit to avoid the effect of such instrument thus fraudulently obtained without a special act of congress in each case, or without some special authority applicable to this class of cases?" The same question was raised in the earlier case of U. S. v. Hughes, 11 How. 552, and decided the same way.

We cannot doubt the power of the president to take measures for the protection of a judge of one of the courts of the United States who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death; and we think it clear that where this protection is to be afforded through the civil power, the department of justice is the proper one to set in motion the necessary means of protection. The correspondence, already recited in this opinion, between the marshal of the northern district of California and the attorney general and the district attorney of the United States for that district, although prescribing no very specific mode of affording this protection by the attorney general, is sufficient, we think, to warrant the marshal in taking the steps which he did take, in making the provisions which he did make, for the protection and defense of Mr. Justice FIELD.

But there is positive law investing the marshals and their deputies with powers which not only justify what Marshal Neagle did in this matter, but which imposed it upon him as a duty. In chapter 14, title 13, of the Revised Statutes of the United States, which is devoted to the appointment and duties of the district attorneys, marshals, and clerks of the courts of the United States, section 788 declares: "The marshals and their deputies shall have, in each state, the same powers in executing the laws of the United States as the sheriffs and their deputies in such state may have, by law, in executing the laws thereof." If, therefore, a sheriff of the state of California was authorized to do in regard to the laws of California what Neagle did, —that is, if he was authorized to keep the peace, to protect a judge from assault and murder,—then Neagle was authorized to do the same thing in reference to the

laws of the United States. Section 4176 of the Political Code of California reads as follows: "The sheriff must (1) preserve the peace; (2) arrest and take before the nearest magistrate, for examination, all persons who attempt to commit, or have committed, a public offense; (3) prevent and suppress all affrays, breaches of the peace, riots, and insurrections which may come to his knowledge." And the Penal Code of California declares (section 197) that homicide is justifiable when committed by any person "when resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person," or "when committed in defense of habitation, property, or person against one who manifestly intends or endeavors, by violence or surprise, to commit a felony." That there is a peace of the United States; that a man assaulting a judge of the United States while in the discharge of his duties violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the state of California,—are questions too clear to need argument to prove them. That it would be the duty of a sheriff, if one had been present at this assault by Terry upon Judge FIELD, to prevent this breach of the peace, to prevent this assault, to prevent the murder which was contemplated by it, cannot be doubted. And if, in performing his duty, it became necessary, for the protection of Judge FIELD or of himself, to kill Terry, in a case where, like this, it was evidently a question of the choice of who should be killed, —the assailant and violator of the law and disturber of the peace, or the unoffending man who was in his power,—there can be no question of the authority of the sheriff to have killed Terry. So the marshal of the United States, charged with the duty of protecting and guarding the judge of the United States court against this special assault upon his person and his life, being present at the critical moment, when prompt action was necessary, found it to be his duty—a duty which he had no liberty to refuse to perform—to take the steps which resulted in Terry's death. This duty was imposed on him by the section of the Revised Statutes which we have recited, in connection with the powers conferred by the state of California upon its peace officers, which become, by this statute, in proper cases, transferred as duties to the marshals of the United States.

But, all these questions being conceded, it is urged against the relief sought by this writ of *habeas corpus* that the question of the guilt of the prisoner of the crime of murder is a question to be determined by the laws of California, and to be decided by its courts, and that there exists no power in the government of the United States to take away the prisoner from the custody of the proper authorities of the state of California, and carry him before a judge of the court of the United States, and release him without a trial by jury according to the laws of the state of California. That the statute of the United States authorizes and directs such a proceeding and such a judgment in a case where the offense charged against the prisoner consists in an act done in pursuance of a law of the United States, and by virtue of its authority, and where the imprisonment of the party is in violation of the constitution and laws of the United States, is clear by its express language. The enactments now found in the Revised Statutes of the United States on the subject of the writ of *habeas corpus* are the result of a long course of legislation forced upon congress by the attempt of the states of the Union to exercise the power of imprisonment over officers and other persons asserting rights under the federal government or foreign governments, which the states denied. The original act of congress on the subject of the writ of *habeas corpus*, by its fourteenth section, authorized the judges and the courts of the United States, in the case of prisoners in jail or in custody under or by color of the authority of the United States, or committed for trial before some court of the same, or when necessary to be brought into court to testify, to issue the writ, and the judge or court before whom they were brought was directed to make inquiry into the cause of commitment. 1 St. 81. This did not present the question, or at least it gave rise to no question which came before the courts, as to releasing by this writ parties held in custody under the laws of the states. But when, during the controversy growing out of the nullification laws of South Carolina, officers of the United States were arrested and imprisoned for the performance of their duties in collecting the revenue of the United States in that state and held by the state authorities, it became necessary for the congress of the United States to take some action for their relief. Accordingly the act of congress of March 2, 1833, (4 St. 634,) among other remedies for such condition of affairs, provided by its seventh section that the federal judges should grant writs of *habeas corpus* in all cases of a prisoner in jail or confinement, where he should be committed or confined on or by any authority or law for any act done or omitted to be done in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof.

The next extension of the circumstances on which a writ of *corpus habeas* might issue by the federal judges arose out of the celebrated McLeod Case, in which McLeod, charged with murder, in a state court of New York, had pleaded that he was a British subject, and that what he had done was under and by the authority of his government, and should be a matter of international adjustment, and that he was not subject to be tried by a court of New York under the laws of that state. The federal government acknowledged the force of this reasoning, and undertook to obtain from the government of the state of New York the release of the prisoner, but failed. He was, however, tried and acquitted, and afterwards released by the state of New York. This led to an extension of the powers of the federal judges under the writ of *habeas corpus* by the act of August 29, 1842, (5 St. 539,) entitled "An

act to provide further remedial justice in the courts of the United States." It conferred upon them the power to issue a writ of *habeas corpus* in all cases where the prisoner claimed that the act for which he was held in custody was done under the sanction of any foreign power, and where the validity and effect of this plea depended upon the law of nations. In advocating the bill, which afterwards became a law on this subject, Senator Berrien, who introduced it into the senate, observed: "The object was to allow a foreigner prosecuted in one of the states of the Union for an offense committed in that state, but which, he pleads, has been committed under authority of his own sovereignty or the authority of the law of nations, to be brought up on that issue before the only competent judicial power to decide upon matters involved in foreign relations or the law of nations. The plea must show that it has reference to the laws or treaties of the United States or the law of nations; and showing this, the writ of *habeas corpus* is awarded to try that issue. If it shall appear that the accused has a bar on the plea alleged, it is right and proper that he should not be delayed in prison, awaiting the proceedings of the state jurisdiction in the preliminary issue of his plea at bar. If satisfied of the existence in fact and validity in law of the bar, the federal jurisdiction will have the power of administering prompt relief." No more forcible statement of the principle on which the law of the case now before us stands can be made.

The next extension of the powers of the court under the writ of *habeas corpus* was the act of February 5, 1867, (14 St. 385;) and this contains the broad ground of the present Revised Statutes, under which the relief is sought in the case before us, and includes all cases of restraint of liberty in violation of the constitution or a law or treaty of the United States, and declares that "the said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested, and, if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty."

It would seem as if the argument might close here. If the duty of the United States to protect its officers from violence, even to death, in discharge of the duties which its laws impose upon them, be established, and congress has made the writ of *habeas corpus* one of the means by which this protection is made efficient, and if the facts of this case show that the prisoner was acting both under the authority of law and the directions of his superior officers of the department of justice, we can see no reason why this writ should not be made to serve its purpose in the present case. We have already cited such decisions of this court as are most important and directly in point, and there is a series of cases decided by the circuit and district courts to the same purport. Several of these arose out of proceedings under the fugitive slave law, in which the marshal of the United States, while engaged in apprehending the fugitive slave with a view to returning him to his master in another state, was arrested by the authorities of the state. In many of these cases they made application to the judges of the United States for relief by the writ of *habeas corpus*, which gave rise to several very interesting decisions on this subject. In Ex parte Jenkins, 2 Wall. Jr. 521, 529,[6] the marshal, who had been engaged, while executing a warrant, in arresting a fugitive, in a bloody encounter, was himself arrested under a warrant of a justice of the peace for assault with intent to kill, which makes the case very analogous to the one now under consideration. He presented to the circuit court of the United States for the eastern district of Pennsylvania a petition for a writ of *habeas corpus*, which was heard before Mr. Justice GRIER, who held that under the act of 1833, already referred to, the marshal was entitled to his discharge, because what he had done was in pursuance of and by the authority conferred upon him by the act of congress concerning the rendition of fugitive slaves. He said: "The authority conferred on the judges of the United States by this act of congress gives them all the power that any other court could exercise under the writ of *habeas corpus*, or gives them none at all. If, under such a writ, they may not discharge their officer when imprisoned 'by any authority' for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the act was passed. * * * It was passed when a certain state of this Union had threatened to nullify acts of congress, and to treat those as criminals who should attempt to execute them; and it was intended as a remedy against such state legislation." This same matter was up again when the fugitive slave, Thomas, had the marshal arrested in a civil suit for an alleged assault and battery. He was carried before Judge KANE on another writ of *habeas corpus*, and again released. Id. 531. A third time the marshal, being indicted, was arrested on a bench warrant issued by the state court, and again brought before the circuit court of the United States by a writ of *habeas corpus*, and discharged. Some remarks of Judge KANE on this occasion are very pertinent to the objections raised in the present case. He said (Id. 543:) "It has been urged that my order, if it shall withdraw the relators from the prosecution pending against them, [in the state court,] will, in effect, prevent their trial by jury at all, since there is no act of congress under which they can be indicted for an abuse of process. It will not be an anomaly, however, if the action of this court shall interfere with the trial of these prisoners by a jury. Our constitutions secure that mode of trial as a right to the accused; but they nowhere recognize it as a right of the government, either state or federal, still less of an individual prosecutor. The action of a jury is overruled constantly by

[6] Fed. Cas. No. 7,259.

the granting of new trials after conviction. It is arrested by the entering of *nolle prosequis* while the case is at bar. It is made ineffectual at any time by the discharge on *habeas corpus*. * * * And there is no harm in this. No one imagines that because a man is accused he must therefore, of course, be tried. Public prosecutions are not devised for the purpose of indemnifying the wrongs of individuals, still less of retaliating them." Many other decisions by the circuit and district courts to the same purport are to be found, among them the following: Ex parte Robinson, 6 McLean, 355;[7] U. S. v. Jailer Fayette Co., 2 Abb. U. S. 265;[8] Ramsey v. Jailer Warren Co., 2 Flip. 451;[9] In re Neill, 8 Blatchf. 156;[10] Ex parte Bridges, 2 Woods, 428;[11] Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. Rep. 734. Similar language was used by Mr. Choate in the senate of the United States upon the passage of the act of 1842. He said: "If you have the power to interpose after judgment, you have the power to do so before. If you can reverse a judgment, you can anticipate its rendition. If, within the constitution, your judicial power extends to these cases or these controversies, whether you take hold of the case or controversy at one stage or another is totally immaterial. The single question submitted to the national tribunal, the question whether, under the statute adopting the law of nations, the prisoner is entitled to the exemption or immunity he claims, may as well be extracted from the entire case, and presented and decided in those tribunals before any judgment in the state court, as for it to be revised afterwards on a writ of error. Either way, they pass on no other question. Either way, they do not administer the criminal law of a state. In the one case as much as in the other, and no more, do they interfere with state judicial power."

The same answer is given in the present case. To the objection, made in argument, that the prisoner is discharged by this writ from the power of the state court to try him for the whole offense, the reply is that if the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if, in doing that act, he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the state of California. When these things are shown, it is established that he is innocent of any crime against the laws of the state, or of any other authority whatever. There is no occasion for any further trial in the state court, or in any court. The circuit court of the United States was as competent to ascertain these facts as any other tribunal, and it was not at all necessary that a jury should be impaneled to render a verdict on them. It is the exercise of a power common under all systems of criminal jurisprudence. There must always be a preliminary examination by a committing magistrate, or some similar authority, as to whether there is an offense to be submitted to a jury; and, if this is submitted in the first instance to a grand jury, that is still not the right of trial by jury which is insisted on in the present argument.

We have thus given, in this case, a most attentive consideration to all the questions of law and fact which we have thought to be properly involved in it. We have felt it to be our duty to examine into the facts with a completeness justified by the importance of the case, as well as from the duty imposed upon us by the statute, which we think requires of us to place ourselves, as far as possible, in the place of the circuit court, and to examine the testimony and the arguments in it, and to dispose of the party as law and justice require. The result at which we have arrived upon this examination is that, in the protection of the person and the life of Mr. Justice FIELD while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that, without prompt action on his part, the assault of Terry upon the judge would have ended in the death of the latter; that, such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction. We therefore affirm the judgment of the circuit court authorizing his discharge from the custody of the sheriff of San Joaquin county.

FIELD, J., did not sit at the hearing of this case, and took no part in its decision

Mr. Chief Justice FULLER and Mr. Justice LAMAR dissented.

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[7] Fed. Cas. No. 11,935.
[8] Fed. Cas. No. 15,463.
[9] Fed. Cas. No. 11,547.
[10] Fed. Cas. No. 10,089.
[11] Fed. Cas. No. 1,862.

UNITED STATES v. KAGAMA et al.

(6 Sup. Ct. 1109, 118 U. S. 375.)

Supreme Court of the United States. May 10, 1886.

On a certificate of division in opinion between the judges of the circuit court of the United States for the district of California.

Atty. Gen. Garland and Sol. Gen. Goode, for the United States. Jos. D. Redding, for defendants.

MILLER, J. The case is brought here by certificate of division of opinion between the circuit judge and the district judge holding the circuit court of the United States for district of California. The questions certified arise on a demurrer to an indictment against two Indians for murder committed on the Indian reservation of Hoopa Valley, in the state of California, the person murdered being also an Indian of said reservation.

Though there are six questions certified as the subject of difference, the point of them all is well set out in the third and sixth, which are as follows: "(3) Whether the provisions of said section 9, (of the act of congress of March 3, 1885,) making it a crime for one Indian to commit murder upon another Indian, upon an Indian reservation situated wholly within the limits of a state of the Union, and making such Indian so committing the crime of murder within and upon such Indian reservation 'subject to the same laws,' and subject to be 'tried in the same courts, and in the same manner, and subject to the same penalties, as are all other persons' committing the crime of murder 'within the exclusive jurisdiction of the United States,' is a constitutional and valid law of the United States." "(6) Whether the courts of the United States have jurisdiction or authority to try and punish an Indian belonging to an Indian tribe, for committing the crime of murder upon another Indian belonging to the same Indian tribe, both sustaining the usual tribal relations, said crime having been committed upon an Indian reservation made and set apart for the use of the Indian tribe to which said Indians both belong."

The indictment sets out in two counts that Kagama, alias Pactah Billy, an Indian, murdered Iyouse, alias Ike, another Indian, at Humboldt county, in the state of California, within the limits of the Hoopa Valley reservation, and it charges Mahawaha, alias Ben, also an Indian, with aiding and abetting in the murder.

The law referred to in the certificate is the last section of the Indian appropriation act of that year, and is as follows:

"Sec. 9. That immediately upon and after the date of the passage of this act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any territory of the United States, and either within or without the Indian reservation, shall be subject therefor to the laws of said territory relating to said crimes, and shall be tried therefor in the same courts, and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of the said crimes respectively; and said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person, within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts, and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

The above enactment is clearly separable into two distinct definitions of the conditions under which Indians may be punished for the same crimes as defined by the common law. The first of these is where the offense is committed within the limits of a territorial government, whether on or off an Indian reservation. In this class of cases the Indian charged with the crime shall be judged by the laws of the territory on that subject, and tried by its courts. This proposition itself is new in legislation of congress, which has heretofore only undertaken to punish an Indian who sustains the usual relation to his tribe, and who commits the offense in the Indian country, or on an Indian reservation, in exceptional cases; as where the offense was against the person or property of a white man, or was some violation of the trade and intercourse regulations imposed by congress on the Indian tribes. It is new, because it now proposes to punish these offenses when they are committed by one Indian on the person or property of another. The second is where the offense is committed by one Indian against the person or property of another, within the limits of a state of the Union, but on an Indian reservation. In this case, of which the state and its tribunals would have jurisdiction if the offense was committed by a white man outside an Indian reservation, the courts of the United States are to exercise jurisdiction as if the offense had been committed at some place within the exclusive jurisdiction of the United States. The first clause subjects all Indians, guilty of these crimes committed within the limits of a territory, to the laws of that territory, and to its courts for trial. The second, which applies solely to offenses by Indians which are committed within the limits of a state and the limits of a reservation, subjects the offenders to the laws of the United States

passed for the government of places under the exclusive jurisdiction of those laws, and to trial by the courts of the United States. This is a still further advance, as asserting this jurisdiction over the Indians within the limits of the states of the Union.

Although the offense charged in this indictment was committed within a state, and not within a territory, the considerations which are necessary to a solution of the problem in regard to the one must in a large degree affect the other. The constitution of the United States is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders. In declaring the basis on which representation in the lower branch of the congress and direct taxation should be apportioned, it was fixed that it should be according to numbers, excluding Indians not taxed, which, of course, excluded nearly all of that race; but which meant that if there were such within a state as were taxed to support the government, they should be counted for representation, and in the computation for direct taxes levied by the United States. This expression, "excluding Indians not taxed," is found in the fourteenth amendment, where it deals with the same subject under the new conditions produced by the emancipation of the slaves. Neither of these shed much light on the power of congress over the Indians in their existence as tribes distinct from the ordinary citizens of a state or territory.

The mention of Indians in the constitution which has received most attention is that found in the clause which gives congress "power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes. While we are not able to see in either of these clauses of the constitution and its amendments any delegation of power to enact a code of criminal law for the punishment of the worst class of crimes known to civilized life when committed by Indians, there is a suggestion in the manner in which the Indian tribes are introduced into that clause which may have a bearing on the subject before us. The commerce with foreign nations is distinctly stated as submitted to the control of congress. Were the Indian tribes foreign nations? If so, they came within the first of the three classes of commerce mentioned, and did not need to be repeated as Indian tribes. Were they nations, in the minds of the framers of the constitution? If so, the natural phrase would have been "foreign nations and Indian nations," or, in the terseness of language uniformly used by the framers of the instrument, it would naturally have been "foreign and Indian nations." And so in the case of Cherokee Nation v. Georgia, brought in the supreme court of the United States, under the declaration that the judicial power extends to suits between a state and foreign states, and giving to the supreme court original jurisdiction where a state is a party, it was conceded that Georgia as a state came within the clause, but held that the Cherokees were not a state or nation, within the meaning of the constitution, so as to be able to maintain the suit. 5 Pet. 20.

But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States, or of the states of the Union. There exists within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies, with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these. The territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by congress. What authority the state governments may have to enact criminal laws for the Indians will be presently considered. But this power of congress to organize territorial governments, and make laws for their inhabitants, arises, not so much from the clause in the constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States, as from the ownership of the country in which the territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else. Murphy v. Ramsey, 114 U. S. 15, 44, 5 Sup. Ct. 747.

In the case of American Ins. Co. v. Canter, 1 Pet. 542, in which the condition of the people of Florida, then under a territorial government, was under consideration, Marshall, C. J., said: "Perhaps the power of governing a territory belonging to the United States which has not, by becoming a state, acquired the means of self-government, may result necessarily from the fact that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestionable."

In the case of U. S. v. Rogers, 4 How. 572,

where a white man pleaded in abatement to an indictment for murder, committed in the country of the Cherokee Indians, that he had been adopted by and become a member of the Cherokee tribe, Chief Justice Taney said: "The country in which the crime is charged to have been committed is a part of the territory of the United States, and not within the limits of any particular state. It is true it is occupied by the Cherokee Indians, but it has been assigned to them by the United States as a place of domicile for the tribe, and they hold with the assent of the United States, and under their authority." After referring to the policy of the European nations and the United States in asserting dominion over all the country discovered by them, and the justice of this course, he adds: "But had it been otherwise, and were the right and propriety of exercising this power now open to question, yet it is a question for the law-making and political departments of the government, and not for the judicial. It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit of dispute, that the Indian tribes, residing within the territorial limits of the United States, are subject to their authority, and when the country occupied by one of them is not within the limits of one of the states, congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian."

The Indian reservation in the case before us is land bought by the United States from Mexico by the treaty of Guadaloupe Hidalgo, and the whole of California, with the allegiance of its inhabitants, many of whom were Indians, was transferred by that treaty to the United States. The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States, has always been an anomalous one, and of a complex character. Following the policy of the European governments in the discovery of America, towards the Indians who were found here, the colonies before the Revolution, and the states and the United States since, have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. But they asserted an ultimate title in the land itself, by which the Indian tribes were forbidden to sell or transfer it to other nations or peoples without the consent of this paramount authority. When a tribe wished to dispose of its land, or any part of it, or the state or the United States wished to purchase it, a treaty with the tribe was the only mode in which this could be done. The United States recognized no right in private persons, or in other nations, to make such a purchase by treaty or otherwise. With the Indians themselves these relations are equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided.

Perhaps the best statement of their position is found in the two opinions of this court by Chief Justice Marshall in the case of Cherokee Nation v. Georgia, 5 Pet. 1, and in the case of Worcester v. Georgia, 6 Pet. 536. These opinions are exhaustive; and in the separate opinion of Mr. Justice Baldwin, in the former, is a very valuable resume of the treaties and statutes concerning the Indian tribes previous to and during the confederation. In the first of the above cases it was held that these tribes were neither states nor nations, had only some of the attributes of sovereignty, and could not be so far recognized in that capacity as to sustain a suit in the supreme court of the United States. In the second case it was said that they were not subject to the jurisdiction asserted over them by the state of Georgia, which, because they were within its limits, where they had been for ages, had attempted to extend her laws and the jurisdiction of her courts over them. In the opinions in these cases they are spoken of as "wards of the nation;" "pupils;" as local dependent communities. In this spirit the United States has conducted its relations to them from its organization to this time. But, after an experience of a hundred years of the treaty-making system of government, congress has determined upon a new departure,—to govern them by acts of congress. This is seen in the act of March 3, 1871, embodied in section 2079 of the Revised Statutes: "No Indian nation or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made, and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

The Case of Crow Dog, 109 U. S. 556, 3 Sup. Ct. 396, in which an agreement with the Sioux Indians, ratified by an act of congress, was supposed to extend over them the laws of the United States and the jurisdiction of its courts, covering murder and other grave crimes, shows the purpose of congress in this new departure. The decision in that case admits that if the intention of congress had been to punish, by the United States courts, the murder of one Indian by another, the law would have been valid. But the court could not see, in the agreement with the Indians sanctioned by congress, a purpose to repeal section 2146 of the Re-

vised Statutes, which expressly excludes from that jurisdiction the case of a crime committed by one Indian against another in the Indian country. The passage of the act now under consideration was designed to remove that objection, and to go further by including such crimes on reservations lying within a state. Is this latter fact a fatal objection to the law? The statute itself contains no express limitation upon the powers of a state, or the jurisdiction of its courts. If there be any limitation in either if these, it grows out of the implication arising from the fact that congress has defined a crime committed within the state, and made it punishable in the courts of the United States. But congress has done this, and can do it, with regard to all offenses relating to matters to which the federal authority extends. Does that authority extend to this case?

It will be seen at once that the nature of the offense (murder) is one which in most all cases of its commission is punishable by the laws of the states, and within the jurisdiction of their courts. The distinction is claimed to be that the offense under the statute is committed by an Indian, that it is committed on a reservation set apart within the state for residence of the tribe of Indians by the United States, and the fair inference is that the offending Indian shall belong to that or some other tribe. It does not interfere with the process of the state courts within the reservation, nor with the operation of state laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation. It seems to us that this is within the competency of congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States,—dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen.

In the case of Worcester v. Georgia, 6 Pet. 515, it was held that, though the Indians had by treaty sold their land within that state, and agreed to remove away, which they had failed to do, the state could not, while they remained on those lands, extend its laws, criminal and civil, over the tribes; that the duty and power to compel their removal was in the United States, and the tribe was under their protection, and could not be subjected to the laws of the state, and the process of its courts.

The same thing was decided in the case of Fellows v. Blacksmith, 19 How. 366. In this case, also, the Indians had sold their lands under supervision of the states of Massachusetts and of New York, and had agreed to remove within a given time. When the time came a suit to recover some of the land was brought in the supreme court of New York, which gave judgment for the plaintiff. But this court held, on writ of error, that the state could not enforce this removal, but the duty and the power to do so was in the United States. See, also, the cases of Kansas Indians, 5 Wall. 737; New York Indians, Id. 761.

The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.

We answer the questions propounded to us: that the ninth section of the act of March 23, 1885, is a valid law in both its branches, and that the circuit court of the United States for the district of California has jurisdiction of the offense charged in the indictment in this case.

WILLAMETTE IRON BRIDGE CO. v. HATCH et al.

(8 Sup. Ct. 811, 125 U. S. 1.)

Supreme Court of the United States. March 19, 1888.

Appeal from the circuit court of the United States for the district of Oregon.

Rufus Mallory and John Mullan, for appellants. J. N. Dolph, for appellees.

BRADLEY, J. This is a bill of review filed by the appellants, a corporation of Oregon, to obtain the reversal of a decree made by the court below against them in favor of Hatch and Lownsdale, the appellees. The case is, shortly, this: On the 18th of October, 1878, the legislature of Oregon passed an act entitled "An act to authorize the construction of a bridge on the Willamette river, between the city of Portland and the city of East Portland, in Multnomah county, state of Oregon;" by which it was enacted as follows, to-wit: "Be it enacted," etc., "that it shall be lawful for the Portland Bridge Company, a corporation duly incorporated under and in conformity with the laws of the state of Oregon, or its assigns, and that said corporation or its assigns be and are hereby authorized and empowered to construct, build, maintain, use, or cause to be constructed, built, and maintained or used, a bridge across the Willamette river, between Portland and East Portland, in Multnomah county, state of Oregon, for any and all purposes of travel or commerce; said bridge to be erected at any time within six years after the passage and approval of this act, at such point or location on the banks of said river, on and along any of the streets of either of said cities of Portland and East Portland as may be selected or determined on by said corporation or its assigns, on or above Morrison street of said city of Portland and M street of said city of East Portland; the same to be deemed a lawful structure: provided, that there shall be placed and maintained in said bridge a good and sufficient draw of not less than one hundred feet in the clear in width of a passage-way, and so constructed and maintained as not to injuriously impede and obstruct the free navigation of said river, but so as to allow the easy and reasonable passage of vessels through said bridge: and provided, that the approaches on the Portland side to said bridge shall conform to the present grade of Front street in said city of Portland." In the month of July, 1880, the appellants, the Willamette Iron Bridge Company, claiming to be assignees of the Portland Bridge Company, and to act under and by authority of said law, began the construction of a bridge across the Willamette river, from the foot of Morrison street, in the city of Portland, and proceeded in the work so far as to erect piers on the bed of the river, with a draw-pier in the channel, on which a pivot-draw was to be placed, with a clear passage-way on each side, when open, of 100 feet in width,—or, as the appellants allege, 105 feet in width. On the 3d of January, 1881, while the appellants were thus engaged in erecting the bridge, Hatch and Lownsdale filed a bill in the circuit court of the United States for an injunction to restrain the appellants from further proceeding with the work, and to compel them to abate and remove the structures already placed in the river. This bill described the complainants therein as citizens of the United States, residing at Portland, in the state of Oregon, and the defendants as a corporation organized under the laws of that state, having its office and principal place of business at Portland, and alleged that the Willamette river is a known public river of the United States, situate within the state of Oregon, navigated by licensed and enrolled and registered sea-going vessels engaged in commerce with foreign nations and with other states, upon the ocean, and by way of the Columbia river,—also a known public and navigable river of the United States,—from its confluence with the Columbia river to the docks and wharves of the port of Portland, and that, up to and beyond the wharves and warehouses of the complainants, Hatch and Lownsdale, it is within the ebb and flow of the ocean tides. That, by the act of congress of February 14, 1859, admitting the state of Oregon into the Union, it is declared "that all the navigable waters of said state shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll therefor." 11 St. 383. That congress has established a port of entry at the city of Portland, on the Willamette river, and has required vessels which navigate it to be enrolled and licensed, etc., and has frequently directed the improvement of the navigation of the said river, and appropriated money for that purpose; and by an act approved February 2, 1870, giving consent to the erection of another bridge across said river from Portland to East Portland, asserted the powers of the United States to regulate commerce upon said river, and to prevent obstruction to the navigation of the same, and in said act declared: "But until the secretary of war approves the plan and location of said bridge, and notifies the said corporation, association, or company of the same, the bridge shall not be built or commenced." The complainants further stated that Lownsdale was the owner and Hatch the lessee of a certain wharf and warehouses in Portland, situated about 750 feet above the proposed bridge, heretofore accessible to and used by sea-going vessels and others; and that Hatch is the owner of a steam tow-boat, used for towing vessels up and down the river to and from the said wharves and warehouses and others in the city; that vessels

of 2,000 tons have been in the habit of navigating the river for a mile above the site of the proposed bridge; and that the said river ought to remain free and unobstructed. But they charge that the bridge and piers will be a serious obstruction to this commerce; that the passage-ways will not be sufficient for sea-going vessels, with their tugs; that the bridge is being constructed diagonally, and not at right angles, to the current of the river; that it will arrest and pile up the floating ice and timber in high stages of water in such a way as to obstruct the passage of vessels; and in various other particulars stated in the bill it is charged that the bridge will be a serious obstruction to the navigation of the river. The complainants contended that the act of the legislature authorizing the bridge contravenes the laws of the United States declaring the river free, and was not passed with the consent of congress, and was a wrongful assumption of power on the part of the state; and alleged that the pretended assignment by the Portland Bridge Company to the defendants, the Willamette Iron Bridge Company, was not in good faith and was not authorized by the directors of the former; and stated various other matters of alleged irregularity and illegality on the part of the Portland Company and the defendants. They also stated that the bridge was not being constructed in conformity with the requirements of the state law; that, by reason of its diagonal position across the river, the thread of the current formed an acute angle with the line of the bridge, and that the draws do not afford more than 87 feet of a passage-way for the passage of vessels; and that vessels will be unable to pass through said bridge for at least four months of the busiest shipping season of the year. The defendants in that case, the Willamette Iron Bridge Company, filed an answer in which they admitted that they were building the bridge, and claimed to do so as assignees in good faith of the Portland Bridge Company, under and by virtue of the act of the legislature before mentioned, but denied the allegations of the bill with regard to the injurious effects of the bridge upon the navigation of the river, and averred that they were complying in every respect with the state law. The cause being put at issue, and proofs being taken, on the 22d of October, 1881, a decree was made in favor of the complainants for a perpetual injunction against the building of the bridge, and for an abatement of the portion already built. The decision of the case was placed principally on the ground that the bridge would be, and that the piers were, an obstruction to the navigation of the river, contrary to the act of congress passed in 1859, admitting Oregon into the Union, and declaring "that all the navigable waters of the said state shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll therefor;" and that, without the consent of congress, a state law was not sufficient authority for the erection of such a structure; and, even if it was, the bridge did not conform to the requirements of the state law. See Hatch v. Bridge Co., 7 Sawy. 127, 141, 6 Fed. 326, 780.[1] The defendants took an appeal, which was not prosecuted; but after the decision of this court in the case of Escanaba Co. v. Chicago, 107 U. S. 678, 2 Sup. Ct. 185, they filed the present bill of review for the reversal of the decree. The reasons assigned for a reversal are, among others, that the court erred in holding and decreeing as follows, to-wit: (1) That the bridge, where and as being constructed, was a serious obstruction to the navigation of the Willamette river, contrary to the act of congress of February 14, 1859, admitting the state of Oregon into the Union, which declares that all the navigable waters of the state shall be common highways, and forever free to all citizens of the United States; (2) that the said court, under section 1 of the act of March 3, 1875, giving it jurisdiction of a suit arising under an act of congress, has authority to restrain parties from violating said act by obstructing the navigation of any of said waters, at the suit of any one injured thereby; (3) that the proposed bridge is and will be a nuisance and serious impediment to the navigation of said river; (4) that the legislature of the state of Oregon has not the power to say absolutely that a bridge may be built with only a draw of 100 feet; (5) that the Willamette Iron Bridge Company, as the assignee of the Portland Bridge Company, was not authorized by the act of the legislative assembly of Oregon to construct the said bridge, because it would be a violation of the said act of congress of February 14, 1859, admitting the state of Oregon into the Union, and was and is, therefore, void; (6) that the defendant should be perpetually enjoined from constructing or proceeding with the construction of the said bridge; and (7) that the defendant should be required to abate and remove out of said river all piers, foundations, etc., which it has placed or constructed therein. This bill was demurred to, and the court affirmed the decree in the original suit and dismissed the bill of review. Bridge Co. v. Hatch, 9 Sawy. 643, 19 Fed. 347. The present appeal is taken from this decree.

On a pure bill of review, like the one in this case, nothing will avail for a reversal of the decree but errors of law apparent on the record. Whiting v. Bank, 13 Pet. 6; Putnam v. Day, 22 Wall. 60; Buffington v. Harvey, 95 U. S. 99; Thompson v. Maxwell, Id. 397; Beard v. Burts, Id. 434; Shelton v. Van Kleeck, 106 U. S. 532, 1 Sup. Ct. 491; Nickle v. Stewart, 111 U. S. 776, 4 Sup Ct. 700. Does any such error appear in the present case? The court below has decided in the negative. We are called upon to deter-

[1] See, also, 27 Fed. 673.

mine whether that decision was correct. It must be assumed that the questions of fact at issue between the parties were decided correctly by the court upon its view of the law applicable to the case. But the important question is, was its view of the law correct? The parties in the cause, both plaintiffs and defendants, were citizens of the state of Oregon. The court, therefore, must necessarily have held,—as we know from its opinion that it did hold,—that the case was one arising under the constitution or laws of the United States. The gravamen of the bill was the obstruction of the navigation of the Willamette river by the defendants, by the erection of the bridge which they were engaged in building. The defendants pleaded the authority of the state legislature for the erection of the bridge. The court held that the work was not done in conformity with the requirements of the state law; but whether it were or not, it lacked the assent of congress, which assent the court held was necessary in view of that provision in the act of congress admitting Oregon as a state, which has been referred to. The court held that this provision of the act was tantamount to a declaration that the navigation of the Willamette river should not be obstructed or interfered with, and that any such obstruction or interference, without the consent of congress, whether by state sanction or not, was a violation of the act of congress; and that the obstruction complained of was in violation of said act; and this is the principal and important question in this case, namely, whether the erection of a bridge over the Willamette river at Portland was a violation of said act of congress. If it was not, if it could not be, if the act did not apply to obstructions of this kind, then the case did not arise under the constitution or laws of the United States, unless under some other law referred to in the bill.

The power of congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned. But until it does pass some such law, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction. No precedent, however, exists for the enforcement of any such law; and if such law could be enforced, (a point which we do not undertake to decide,) it would not avail to sustain the bill in equity filed in the original case. There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the states. Such obstructions and nuisances are offenses against the laws of the states within which the navigable waters lie, and may be indicted or prohibited as such; but they are not offenses against United States laws which do not exist; and none such exist except what are to be found on the statute book. Of course, where the litigant parties are citizens of different states, the circuit courts of the United States may take jurisdiction on that ground, but on no other. This is the result of so many cases, and expressions of opinion by this court, that it is almost superfluous to cite authorities on the subject. We refer to the following by way of illustration: Willson v. Creek Co., 2 Pet. 245; Pollard's Lessee v. Hagan, 3 How. 229; Passaic Bridge Cases, 3 Wall. 782; Gilman v. Philadelphia, Id. 724; Pound v. Turck, 95 U. S. 459; Escanaba Co. v. Chicago, 107 U. S. 678, 2 Sup. Ct. 185; Cardwell v. Bridge Co., 113 U. S. 205, 5 Sup. Ct. 423; Hamilton v. Railroad, 119 U. S. 280, 7 Sup. Ct. 206; Huse v. Glover, 119 U. S. 543, 7 Sup. Ct. 313; Sands v. Improvement Co., 123 U. S. 288, 8 Sup. Ct. 113; Transportation Co. v. Parkersburg, 107 U. S. 691, 700, 2 Sup. Ct. 732. The usual case, of course, is that in which the acts complained of are clearly supported by a state statute; but that really makes no difference. Whether they are conformable, or not conformable, to the state law relied on, is a state question, not a federal one. The failure of state functionaries to prosecute for breaches of the state law does not confer power upon United States functionaries to prosecute under a United States law, when there is no such law in existence.

But, as we have stated, the court below held that the act of congress of 1859 was a law which prohibited any obstructions or impediments to the navigation of the public rivers of Oregon, including that of the Willamette river. Was it such an act? Did it have such effect? The clause in question had its origin in the fourth article of the compact contained in the ordinance of the old congress for the government of the territory northwest of the Ohio, adopted July 13, 1787; in which it was, among other things, declared that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor." 1 St. 52. This court has held that when any new state was admitted into the Union from the Northwest Territory, the ordinance in question ceased to have any operative force in limiting its powers of legislation as compared with those possessed by the original states. On the admission of any such new state, it at once became entitled to and possessed all the rights of dominion and sovereignty which belonged to them. See the cases of Pollard's Lessee v. Hagan, supra; Permoli v. First Municipality, 3 How. 589; Escanaba Co. v. Chicago; Cardwell v. Bridge Co.; Huse v. Glover,—qua supra. In admitting some of the new states, however, the clause in question has been inserted in the law, as it was in the case of Oregon, whether

the state was carved out of the territory northwest of the Ohio, or not; and it has been supposed that in this new form of enactment it might be regarded as a regulation of commerce, which congress has the right to impose. Pollard's Lessee v. Hagan, 3 How. 212, 230. Conceding this to be the correct view, the question then arises, what is its fair construction? What regulation of commerce does it affect? Does it prohibit physical obstructions and impediments to the navigation of the streams? Or does it prohibit only the imposition of duties for the use of the navigation, and any discrimination denying to citizens of other states the equal right to such use? This question has been before this court, and has been decided in favor of the latter construction.

It is obvious that if the clause in question does prohibit physical obstructions and impediments in navigable waters, the state legislature itself, in a state where the clause is in force, would not have the power to cause or authorize such obstructions to be made without the consent of congress. But it is well settled that the legislatures of such states do have the same power to authorize the erection of bridges, dams, etc., in and upon the navigable waters wholly within their limits, as have the original states, in reference to which no such clause exists. It was so held in Pound v. Turck, 95 U. S. 459, in reference to a dam in the Chippewa river, in Wisconsin; in Cardwell v. Bridge Co., 113 U. S. 205, 5 Sup. Ct. 423; in reference to a bridge without a draw, erected on the American river, in California, which prevented steam-boats from going above it; and in Hamilton v. Railroad Co., 119 U. S. 280, 7 Sup. Ct. 206, relating to railroad bridges in Louisiana,—in all which cases the clause in question was in force in the states where they arose, and in none of them was said clause held to restrain in any degree the full power of the state to make, or cause to be made, the erections referred to, which must have been more or less obstructions and impediments to the navigation of the streams on which they were placed. In Cardwell v. Bridge Co., the two alternate constructions of the clause above suggested were brought to the attention of the court, and, on consideration, it was held as follows: "Upon mature and careful consideration which we have given in this case to the language of the clause in the act admitting California, we are of opinion that, if we treat the clause as divisible into two provisions, they must be construed together as having but one object, namely, to insure a highway equally open to all without preference to any, and unobstructed by duties or tolls, and thus prevent the use of the navigable streams by private parties to the exclusion of the public, and the exaction of any toll for their navigation; and that the clause contemplated no other restriction upon the power of the state in authorizing the construction of bridges over them, whenever such construction would promote the convenience of the public." In Hamilton Railroad Co. it was said: "Until congress intervenes in such cases, and exercises its authority, the power of the state is plenary. When the state provides for the form and character of the structure, its directions will control, except as against the action of congress, whether the bridge he with or without draws, and irrespective of its effect upon navigation;" and in the same case the construction given to the clause in question in Cardwell v. Bridge Co. was reiterated, namely, that it was intended to prevent any discrimination against citizens of other states in the use of navigable streams, and any tax or toll for their use. In Huse v. Glover, 119 U. S. 543, 7 Sup. Ct. 313, where a portion of the Illinois river had been improved by the state of Illinois, by the erection of locks in the river, and a toll was charged for passing through the same, it was held that this was no encroachment upon the power of congress to regulate commerce, and that, while the ordinance of 1787 was no longer in force in Illinois, yet, if it were, the construction given to the clause in the Cardwell Case was approved, and the following observation was made: "As thus construed the clause would prevent any exclusive use of the navigable waters of the state,—a possible farming out of the privilege of navigating them to particular individuals, classes, or corporations, or by vessels of a particular character." It was also held that the exaction of tolls for passage through the locks, as a compensation for the use of the artificial facilities constructed, was not an impost upon the navigation of the stream. The same views are held in the recent case of Sands v. Improvement Co., 123 U. S. 288, 8 Sup. Ct. 113.

It seems clear, therefore, that according to the construction given by this court to the clause in the act of congress relied upon by the court below, it does not refer to physical obstructions, but to political regulations which would hamper the freedom of commerce. It is to be remembered that in its original form the clause embraced carrying places between the rivers as well as the rivers themselves; and it cannot be supposed that those carrying places were intended to be always kept up as such. No doubt that at the present time some of them are covered by populous towns, or occupied in some other way incompatible with their original use; and such a diversion of their use, in the progress of society, cannot but have been contemplated. What the people of the old states wished to secure was the free use of the streams and carrying places in the Northwest Territory, as fully as it might be enjoyed by the inhabitants of that territory themselves, without any impost or discriminating burden. The clause in question cannot be regarded as establish-

ing the police power of the United States over the rivers of Oregon, or as giving to the federal courts the right to hear and determine, according to federal law, every complaint that may be made of an impediment in, or an encroachment upon, the navigation of those rivers. We do not doubt that congress, if it saw fit, could thus assume the care of said streams, in the interest of foreign and interstate commerce; we only say that, in our opinion, it has not done so by the clause in question. And although, until congress acts, the states have the plenary power supposed, yet, when congress chooses to act, it is not concluded by anything that the states, or that individuals, by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose. It is for this reason, namely, the ultimate (though yet unexerted) power of congress over the whole subject-matter, that the consent of congress is so frequently asked to the erection of bridges over navigable streams. It might itself give original authority for the erection of such bridges when called for by the demands of interstate commerce by land; but in many, perhaps the majority, of cases, its assent only is asked, and the primary authority is sought at the hands of the state. With regard to this very river, the Willamette, three acts of congress have been passed in relation to the construction of bridges thereon, to-wit, one approved February 2, 1870, which gave consent to the corporation of the city of Portland to erect a bridge from Portland to the east bank of the river, not obstructing, impairing, or injuriously modifying its navigation, and first submitting the plans to the secretary of war; another, approved on the 22d of June, 1874, which authorized the county commissioners of Marion county, or said commissioners jointly with those of Polk county, to build a bridge across said river at Salem; a third act, approved June 23, 1874, which authorized the Oregon & California Railroad Company, alone, or jointly with the Oregon Central Railroad Company, to build a railroad bridge across said river at the city of Portland, with a draw of not less than 100 feet in the clear on each side of the draw abutment, and so constructed as not to impede the navigation of the river, and allow the free passage of vessels through the bridge. These acts are special in their character, and do not involve the assumption by congress of general police power over the river.

The argument of the appellees, that congress must be deemed to have assumed police power over the Willamette river in consequence of having expended money in improving its navigation, and of having made Portland a port of entry, is not well founded. Such acts are not sufficient to establish the police power of the United States over the navigable streams to which they relate. Of course, any interference with the operations, constructions, or improvements made by the general government, or any violation of a port law enacted by congress, would be an offense against the laws and authority of the United States, and an action or suit brought in consequence thereof would be one arising under the laws of the United States; but no such violation, or interference is shown by the allegations of the bill in the original suit in this case, which simply states the fact that improvements have been made in the river by the government, without stating where, and that Portland had been created a port of entry. In the case of Escanaba Co. v. Chicago, it was said: "As to the appropriations made by congress, no money has been expended on the improvement of the Chicago river above the first bridge from the lake, known as 'Rush-Street Bridge.' No bridge, therefore, interferes with the navigation of any portion of the river which has been thus improved. But, if it were otherwise, it is not perceived how the improvement of the navigability of the stream can affect the ordinary means of crossing it by ferries and bridges." 107 U. S. 690, 2 Sup. Ct. 195. In the present case there is no allegation, if such an allegation would be material, that any improvements in the navigation of the Willamette river have been made by the government at any point above the site of the proposed bridge.

As to the making of Portland a port of entry, the observations of Mr. Justice Grier in the Passaic Bridge Cases, 3 Wall. 782, 793, App., are very apposite. Those cases were decided in September, 1857, by dismissing the bills which were filed for injunctions against the erection of a railroad bridge across the Passaic river at Newark, New Jersey, and a plank-road bridge across the same river below Newark. The decrees were affirmed here by an equally divided court, in December term, 1861. It being urged, among other things, that Newark was a port of entry, and that the erection of these bridges, though under the authority of the state legislature, was in conflict with the act of congress establishing the port, Mr. Justice Grier said: "Congress, by conferring the privilege of a port of entry upon a town or city, does not come in conflict with the police power of a state exercised in bridging her own rivers below such port. If the power to make a town a port of entry includes the right to regulate the means by which its commerce is carried on, why does it not extend to its turnpikes, railroads, and canals, —to land as well as water? Assuming the right (which I neither affirm or deny) of congress to regulate bridges over navigable rivers below ports of entry, yet, not having done so, the courts cannot assume to themselves such a power. There is no act of congress or rule of law which courts could

apply to such a case." These views were adhered to by the same judge in the subsequent case of Gilman v. Philadelphia. The bridge which was the subject of controversy in that case was within the limits of the port of Philadelphia, which, by the act of 1799, included the city of Philadelphia, and by that of 1834 was extended northerly to Gunner's run. See 3 Wall. 718. That case arose soon after the Passaic Bridge Cases, and, so far as interference with navigation was concerned, was identical in character with them; and Mr. Justice Grier, upon the same grounds taken and asserted by him in those cases, dismissed the bill. The decree was affirmed in this court in December term, 1865, by a vote of seven justices to three, Justices Clifford, Wayne, and Davis dissenting; so that Justice Grier's views were finally affirmed by a decided majority of the court.

It is urged that in the Wheeling Bridge Case, 13 How. 518, this court decided the bridge there complained of to be a nuisance, and decreed its prostration, or such increased elevation as to permit the tall chimneys of the Pittsburgh steamers to pass under it at high water. But in that case this court had original jurisdiction in consequence of a state being a party; and the complainant, the state of Pennsylvania, was entitled to invoke, and the court had power to apply, any law applicable to the case, whether state law, federal law, or international law. The bridge had been authorized by the legislature of Virginia, whose jurisdiction extended across the whole river Ohio. But Virginia, in consenting to the erection of Kentucky into a state, had entered into a compact with regard to the free navigation of the Ohio,[2] confirmed by the act of congress admitting Kentucky into the Union, which the court held to be violated by authorizing the bridge to be constructed in the manner it was; and the bridge, so constructed, injuriously affected a supra-riparian state (Pennsylvania) bordering on the river, contrary to international law. Mr. Justice Grier, in the Passaic Bridge Cases, disposes of the Wheeling Bridge Case as follows: "This legislation of Virginia being pleaded as a bar to further action of the court in the case, necessarily raised these questions: Could Virginia license or authorize a nuisance on a public river, flowing, which rose in Pennsylvania, and passed along the border of Virginia, and which, by compact between the states, was declared to be 'free and common to all the citizens of the United States?' If Virginia could authorize any obstruction at all to the channel navigation, she could stop it altogether, and divert the whole commerce of that great river from the state of Pennsylvania, and compel it to seek its outlet by the railroads and other public improvements of Virginia. If she had the sovereign right over this boundary river claimed by her, there would be no measure to her power. She would have the same right to stop its navigation altogether as to stop it ten days in a year. If the plea was admitted, Virginia could make Wheeling the head of navigation on the Ohio, and Kentucky might do the same at Louisville, having the same right over the whole river which Virginia can claim. This plea, therefore, presented not only a great question of international law, but whether rights secured to the people of the United States, by compact made before the constitution, were held at the mercy or caprice of every or any of the states to which the river was a boundary. The decision of the court denied this right. The plea being insufficient as a defense, of course the complainant was entitled to a decree prostrating the bridge, which had been erected pendente lite. But to mitigate the apparent hardship of such a decree, if executed unconditionally, the court, in the exercise of a merciful discretion, granted a stay of execution on condition that the bridge should be raised to a certain height, or have a draw put in it which would permit boats to pass at all stages of the navigation. From this modification of the decree no inference can be drawn that the courts of the United States claim authority to regulate bridges below ports of entry, and treat all state legislation in such cases as unconstitutional and void." "It is evident, from this statement," continues Justice Grier, "that the supreme court, in denying the right of Virginia to exercise this absolute control over the Ohio river, and in deciding that, as a riparian proprietor, she was not entitled, either by the compact, or by constitutional law, to obstruct the commerce of a supra-riparian state, had before them questions not involved in these cases, [the Passaic Bridge Cases,] and which cannot affect their decision. The Passaic river, though navigable for a few miles within the state of New Jersey, and therefore a public river, belongs wholly to that state. It is no highway to other states; no commerce passes thereon from states below the bridge to states above." 3 Wall. 792. This exposition of the Wheeling Bridge Case, by one who had taken a decided part in its discussion and determination, effectually disposes of it as a precedent for the jurisdiction of the circuit courts of the United States in matters pertaining to bridges erected over navigable rivers, at least those erected over rivers whose course is wholly within a single state. The Willamette river is one of that description.

On the whole, our opinion is that the original suit in this case was not a suit arising under any law of the United States; and since, on such ground alone, the court below could have had jurisdiction of it, it fol-

[2] See Mr. Stanton's argument, 13 How. 523; 1 Bioren's Laws U. S. p. 675, art. 7.

lows that the decree on the bill of review must be reversed, and the record remanded, with instructions to reverse the decree in the original suit, and to dismiss the bill filed therein, without prejudice to any other proceeding which may be taken in relation to the erection of said bridge, not inconsistent with this opinion.

BOWMAN et al. v. CHICAGO & N. W. RY. CO.[1]

(8 Sup. Ct. 689, 1062, 125 U. S. 465.)

Supreme Court of the United States. March 19, 1888.

In error to the circuit court of the United States for the Northern district of Illinois.

This action was begun in the circuit court of the United States for the Northern district of Illinois, June 15, 1886, on which day the plaintiffs filed their declaration, as follows: "George A. Bowman, a citizen of the state of Nebraska, and Fred. W. Bowman, a citizen of the state of Iowa, copartners, doing business under the name, firm, and style of Bowman Bros., at the city of Marshalltown, state of Iowa, plaintiffs in this suit, by Blum & Blum, their attorneys, complain of the Chicago and Northwestern Railway Company, a citizen of the Northern district of the state of Illinois, having its principal office at the city of Chicago, in said state, defendant in this suit, of a plea of trespass on the case; for that, whereas, the defendant on May 20, 1886, and for a long time previous thereto and thereafter, was possessed of and using and operating a certain railway, and was a common carrier of goods and chattels thereon for hire, to-wit, from the city of Chicago, in the state of Illinois, to the city of Council Bluffs, in the state of Iowa. That said defendant was at said time, and is now, a corporation existing under and by virtue of the laws of the state of Illinois, and that it was and is the duty of said defendant to carry from and to all stations upon its line of railway all freight tendered it for shipment. That upon May 20, 1886, the plaintiffs offered to said defendant for shipment over its line of railway, and directed to themselves at Marshalltown, Iowa, five thousand barrels of beer, which they had procured in the city of Chicago, to be shipped from said city to the city of Marshalltown, in the state of Iowa, which is a station lying and being on said defendant's line of railroad between said cities of Chicago and Council Bluffs, but the defendant then and there refused to receive said beer, or any part thereof, for shipment, to the damage of the plaintiffs of ten thousand dollars, and therefore they bring their suit, etc. And for that the plaintiffs, neither of whom is an hotel keeper, a keeper of a saloon, eating-house, grocery, or confectionery, on the 7th day of July, 1884, and upon several occasions thereafter, presented to the board of supervisors of Marshall county, Iowa, a certificate signed by a majority of the legal electors of Marshalltown, Marshall county, Iowa, which stated that said Fred. W. Bowman is a citizen of said county. That both of said plaintiffs possess a good moral character, and that they (said electors) believe said plaintiffs to be proper persons, and each of them to be a proper person, to buy and sell intoxicating liquors for the purposes named in section 1526 of the Iowa Code. That at said time, and upon several occasions thereafter, they and each of them, the said plaintiffs, filed a bond in the sum of three thousand dollars with two sureties, which bond was approved by the auditor of said county, as is provided by section 1528 of the Code of Iowa. That thereupon said board of supervisors refused to grant such permission to either of said plaintiffs, or to them jointly. And for that, whereas, the defendant on May 20th, 1886, and for a long time previous thereto and thereafter, was possessed of and using and operating a certain railroad, and was a common carrier of goods and chattels thereon for hire, to-wit, from the city of Chicago, in the state of Illinois, to the city of Council Bluffs, in the state of Iowa. That said defendant is a corporation, existing under and by virtue of the laws of the state of Illinois. That it was the duty of the said defendant to carry from and to all stations upon its line of railway all freight that might be intrusted to it, and that it was the duty of said defendant to transport from said city of Chicago to said city of Marshalltown the five thousand barrels of beer hereinbefore and hereinafter mentioned, which plaintiffs requested it so to transport. That in the commencement of May, 1886, the plaintiffs purchased, at the city of Chicago, five thousand barrels of beer, at $6.50 per barrel; which beer they intended to send to Marshalltown, Iowa, at which place and vicinity they could have sold said beer at eight dollars per barrel, as the defendant was then and there informed. That on May 20, 1886, said plaintiffs offered for shipment to said defendant railway company said five thousand barrels of beer, directed to said plaintiffs, at the city of Marshalltown, in the state of Iowa, and requested said defendant to ship said beer over its road, with which request the defendant refused to comply, and declined to ship or receive said beer, or any part thereof, for shipment as aforesaid; the said defendant, by its duly-authorized agent, then and there stating that the said defendant company declined to receive said goods for shipment, and would continue to decline to receive said goods, or any goods of like character, for shipment into the state of Iowa. That on said day, to-wit, May 20, 1886, and for a long time theretofore and since, the plaintiffs were unable to purchase beer in the state of Iowa. That said plaintiffs, at said time, could procure no other means of transportation for said beer than said defendant, and that, by reason of the defendant's refusal to transport said beer, plaintiffs were compelled to sell said beer in the city of Chicago at $6.50 per barrel. That by reason of said refusal of said defendant to ship said beer plaintiffs have been damaged in the sum of ten thousand dollars, and therefore they bring their suit," etc. To this

[1] Dissenting opinion of Mr. Justice Harlan, omitted.

declaration the defendant filed the following plea: "Now comes the said defendant, by W. C. Goudy, its attorney, and defends the wrong and injury, when," etc., "and says actio non," etc., "because it says that the beer in said five thousand barrels in the plaintiff's declaration, and in each count thereof, mentioned, was at the several times in said declaration mentioned, and still is, intoxicating liquor, within the meaning of the statute of Iowa hereinafter set forth. That the city of Marshalltown in said declaration mentioned, is within the limits of the state of Iowa. That the said city of Chicago in the said declaration mentioned, is in the state of Illinois. That the said beer in said declaration mentioned, was offered to this defendant to be transported from the state of Illinois to the state of Iowa. That heretofore, to-wit, on the 5th day of April, A. D. 1886, the general assembly of the state of Iowa passed an act entitled 'An act amendatory of chapter 143 of the Acts of the Twentieth General Assembly, relating to intoxicating liquors, and providing for the more effectual suppression of the illegal sale and transportation of intoxicating liquors and abatement of nuisances,' which act is chapter 66 of the Laws of Iowa, passed at the twenty-first general assembly of said state, and which is printed and published in the Laws of Iowa for the year 1886, at page —; to which act this defendant hereby refers, and makes the same a part of this plea. That in and by the tenth section of said act it was and is provided as follows, to-wit: 'That section 1553 of the Code, as amended and substituted by chapter 143 of the Acts of the Twentieth General Assembly, be, and the same is hereby, repealed, and the following enacted in lieu thereof: Sec. 1553. If any express company, railway company, or any agent or person in the employ of any express company or railway company, or if any common carrier, or any person in the employ of any common carrier, or any person, knowingly bring within this state for any person or persons or corporation, or shall knowingly transport or convey between points, or from one place to another, in this state, for any other person or persons or corporation, any intoxicating liquors, without first having been furnished a certificate from and under the seal of the county auditor of the county to which said liquor is to be transported, or is consigned for transportation, or within which it is to be conveyed from place to place, certifying that the consignee or person to whom said liquor is to be transported, conveyed, or delivered is authorized to sell such intoxicating liquors in such county, such company, corporation, or person so offending, and each of them, and any agent of such company, corporation, or person so offending, shall, upon conviction thereof, be fined in the sum of one hundred dollars for each offense, and pay costs of prosecution, and the costs shall include a reasonable attorney fee, to be assessed by the court, which shall be paid into the county fund, and stand committed to the county jail until such fine and costs of prosecution are paid. The offense herein defined shall be held to be complete, and shall be held to have been committed in any county of the state through or to which said intoxicating liquors are transported, or in which the same is unloaded for transportation, or in which said liquors are conveyed from place to place or delivered. It shall be the duty of the several county auditors of this state to issue the certificate herein contemplated to any person having such permit, and the certificate so issued shall be truly dated when issued, and shall specify the date at which the permit expires, as shown by the county records.' And the defendant avers that at the several times mentioned in said declaration, and each of them, the aforesaid section was the law of the state of Iowa in full force and wholly unrepealed, and that the said plaintiffs did not at any time furnish this defendant with a certificate from and under the seal of the county auditor of the county of Marshall, the same being the county in which said city of Marshalltown is located, and the county to which said beer was offered to be transported, certifying that the person for or to whom the said beer was to be transported, was authorized to sell intoxicating liquors in said county of Marshall, nor was this defendant furnished with any such certificate by any person whatsoever. And the defendant avers that it could not receive said beer for transportation in the manner named and specified in the plaintiff's declaration without violating the law of the state of Iowa above specified, and without subjecting itself to the penalties provided in said act; and that this defendant assigned, at the time the said beer was offered to it for transportation as aforesaid, as a reason why it could not receive the same, the aforesaid statute of Iowa, which prohibited this defendant from receiving said beer to be transported into the state of Iowa, or from transporting the said beer into the state of Iowa. And this the said defendant is ready to verify. Wherefore it prays judgment," etc. To this plea the plaintiffs filed a general demurrer, and for cause of demurrer assigned that the statute of Iowa referred to and set out in the plea was unconstitutional and void. The demurrer was overruled, and judgment entered thereon against the plaintiffs; to reverse which this writ of error is prosecuted.

Louis J. Blum, for plaintiffs in error. W. C. Goudy, A. J. Baker, and James E. Monroe, for defendant in error.

Mr. Justice MATTHEWS, after stating the facts as above, delivered the opinion of the court.

It is not denied that the declaration sets

out a good cause of action. It alleges that the defendant was possessed of and operated a certain railway, by means of which it became and was a common carrier of goods and chattels thereon for hire, from the city of Chicago, in the state of Illinois, to the city of Council Bluffs, in the state of Iowa, and that, as such, it was its duty to carry from and to all stations upon its line of railway all goods and merchandise that might be intrusted to it for that purpose. This general duty was imposed upon it by the common law as adopted and prevailing in the states of Illinois and Iowa. The single question, therefore, presented upon the record, is whether the statute of the state of Iowa, set out in the plea, constitutes a defense to the action.

The section of the statute referred to, being section 1553 of the Iowa Code, as amended by the act of April 5, 1886, forbids any common carrier to bring within the state of Iowa, for any person or persons or corporation, any intoxicating liquors from any other state or territory of the United States, without first having been furnished with a certificate, under the seal of the county auditor of the county to which said liquor is to be transported, or is consigned for transportation, certifying that the consignee or person to whom said liquor is to be transported, conveyed, or delivered is authorized to sell intoxicating liquors in such county. This statutory provision does not stand alone, and must be considered with reference to the system of legislation of which it forms a part. The act of April 5, 1886, in which it is contained, relates to the sale of intoxicating liquors within the state of Iowa, and is amendatory of chapter 143 of the Acts of the Twentieth General Assembly of that state, "relating to intoxicating liquors, and providing for the more effectual suppression of the illegal sale and transportation of intoxicating liquors and abatement of nuisances." The original section 1553 of the Iowa Code contains a similar provision in respect to common carriers. By section 1523 of the Code, the manufacture and sale of intoxicating liquors, except as thereinafter provided, is made unlawful, and the keeping of intoxicating liquor with intent to sell the same within the state, contrary to the provisions of the act, is prohibited; and the intoxicating liquor so kept, together with the vessels in which it is contained, is declared to be a nuisance, to be forfeited and dealt with as thereinafter provided. Section 1524 excepts from the operation of the law sales by the importer thereof of foreign intoxicating liquor, imported under the authority of the laws of the United States regarding the importation of such liquors, and in accordance with such laws, provided that the said liquor at the time of said sale by said importer remains in the original casks or packages in which it was by him imported, and in quantities of not less than the quantities in which the laws of the United States require such liquors to be imported, and is sold by him in said original casks or packages, and in said quantities only. The law also permits the manufacture in the state of liquors for the purpose of being sold, according to the provisions of the statute, to be used for mechanical, medicinal, culinary, or sacramental purposes; and for these purposes only any citizen of the state, except hotel keepers, keepers of saloons, eating-houses, grocery keepers, and confectioners, is permitted, within the county of his residence, to buy and sell intoxicating liquors, provided he shall first obtain permission from the board of supervisors of the county in which such business is conducted. It also declares the building or erection of whatever kind, or the ground itself in or upon which intoxicating liquor is manufactured or sold, or kept with intent to sell, contrary to law, to be a nuisance, and that it may be abated as such. The original provisions of the Code (section 1555) excluded from the definition of intoxicating liquors, beer, cider from apples, and wine from grapes, currants, and other fruits grown in the state; but by an amendment that section was made to include alcohol, ale, wine, beer, spirituous, vinous, and malt liquors, and all intoxicating liquors whatever. It thus appears that the provisions of the statute set out in the plea, prohibiting the transportation by a common carrier of intoxicating liquor from a point within any other state for delivery at a place within the state of Iowa, is intended to more effectually carry out the general policy of the law of that state with respect to the suppression of the illegal manufacture and sale of intoxicating liquor within the state as a nuisance. It may therefore fairly be said that the provision in question has been adopted by the state of Iowa, not expressly for the purpose of regulating commerce between its citizens and those of other states, but as subservient to the general design of protecting the health and morals of its people, and the peace and good order of the state, against the physical and moral evils resulting from the unrestricted manufacture and sale within the state of intoxicating liquors.

We have had recent occasion to consider state legislation of this character in its relation to the constitution of the United States. In the case of Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, it was said: "That legislation by a state prohibiting the manufacture, within her limits, of intoxicating liquors to be sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the constitution of the United States is made clear by the decisions of this court rendered before and since the adoption of the 14th amendment. * * * These cases rest upon the acknowledged right of the states of the Union to control their purely internal af-

fairs, and in so doing, to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government, or violate rights secured by the constitution of the United States." In the License Cases, 5 How. 504, the question was whether certain statutes of Massachusetts, Rhode Island, and New Hampshire, relating to the sale of spirituous liquors, were repugnant to the constitution of the United States by reason of an alleged conflict between them and the power of congress to regulate commerce with foreign countries and among the several states. The statutes of Massachusetts and of Rhode Island considered in those cases had reference to the sale within those states, respectively, of intoxicating liquor imported from foreign countries, but not sold or offered for sale within the state by the importer in original packages. The statute of New Hampshire, however, applied to intoxicating liquor imported from another state, and the decision in that case upheld its validity in reference to the disposition, by sale or otherwise, of the intoxicating liquor after it had been brought into the state. That judgment, therefore, closely approached the question presented in this case. The justices all concurred in the result, but there was not a majority which agreed upon any specific ground for the conclusion, and it is necessary to compare the several opinions which were pronounced, in order to extract the propositions necessarily embraced in the judgment. Chief Justice Taney was of the opinion that congress had clearly the power to regulate such importation and sale, under the grant of power to regulate commerce among the several states; "yet, as congress has made no regulations on the subject," he said, "the traffic in the article may be lawfully regulated by the state as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the state may suppose to be its interest or duty to pursue." Mr. Justice Catron and Mr. Justice Nelson agreed with the chief justice that the statute of New Hampshire in question was a regulation of commerce, but lawful, because not repugnant to any actual exercise of the commercial power by congress. Mr. Justice McLean seemed to think that the power of congress ended with the importation, and that the sale of the article after it reached its destination was within the exclusive control of the state. He said: "If this tax had been laid on the property as an import into the state, the law would have been repugnant to the constitution. It would have been a regulation of commerce among the states, which has been exclusively given to congress. * * * But this barrel of gin, like all other property within the state of New Hampshire, was liable to taxation by the state. It comes under the general regulation, and cannot be sold without a license." Mr. Justice Daniel denied that the right of importation included the right to sell within the state, contrary to its laws. He impliedly admitted the exclusive power of congress to regulate importation, and maintained, as equally exclusive, the right of the state to regulate the matter of sale. Mr. Justice Woodbury concurred in the same distinction. He said (page 619): "It is manifest, also, whether as an abstract proposition or practical measure, that a prohibition to import is one thing, while a prohibition to sell without a license is another and entirely different." The first, he thought, was within the control of congress, the latter, within the exclusive jurisdiction of the state. He said: "The subject of buying and selling within a state is one as exclusively belonging to the power of the state over its internal trade as that to regulate foreign commerce is with the general government under the broadest construction of that power. * * * The idea, too, that a prohibition to sell would be tantamount to a prohibition to import, does not seem to me either logical or founded in fact. For, even under a prohibition to sell, a person could import, as he often does, for his own consumption, and that of his family and plantations; and also, if a merchant extensively engaged in commerce, often does import articles with no view of selling them here, but of storing them for a higher and more suitable market in another state or abroad." He also said (page 625): "But this license is a regulation neither of domestic commerce between the states, nor of foreign commerce. It does not operate on either, or the imports of either, until they have entered the state, and become component parts of its property. Then it has by the constitution the exclusive power to regulate its own internal commerce and business in such articles, and bind all residents, citizens or not, by its regulations, if they ask its protection and privileges; and congress, instead of being opposed and thwarted by regulations as to this, can no more interfere in it than the states can interfere in regulation of foreign commerce." Mr. Justice Grier concurred mainly in the opinion delivered by Mr. Justice McLean, and did not consider that the question of the exclusiveness of the power of congress to regulate commerce was necessarily connected with the decision of the point that the states had a right to prohibit the sale and consumption of an article of commerce within their limits, which they believed to be pernicious in its effects, and the cause of pauperism, disease, and crime.

From a review of all the opinions, the following conclusions are to be deduced as the result of the judgments in those cases: (1) All the justices concurred in the proposition that the statutes in question were not made void by the mere existence of the

power to regulate commerce with foreign nations, and among the states, delegated to congress by the constitution. (2) They all concurred in the proposition that there was no legislation by congress in pursuance of that power with which these statutes were in conflict. (3) Some, including the chief justice, held that the matter of the importation and sale of articles of commerce was subject to the exclusive regulation of congress, whenever it chose to exert its power, and that any statute of the state on the same subject in conflict with such positive provisions of law enacted by congress would be void. (4) Others maintained the view that the power of congress to regulate commerce did not extend to or include the subject of the sale of such articles of commerce after they had been introduced into a state; but that when the act of importation ended, by a delivery to the consignee, the exclusive power over the subject belonged to the states as a part of their police power. From this analysis it is apparent that the question presented in this case was not decided in the License Cases. The point in judgment in them was strictly confined to the right of the states to prohibit the sale of intoxicating liquor after it had been brought within their territorial limits. The right to bring it within the states was not questioned; and the reasoning which justified the right to prohibit sales admitted, by implication, the right to introduce intoxicating liquor, as merchandise, from foreign countries, or from other states of the Union, free from the control of the several states, and subject to the exclusive power of congress over commerce.

It cannot be doubted that the law of Iowa now under examination, regarded as a rule for the transportation of merchandise, operates as a regulation of commerce among the states. "Beyond all question, the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one state to another was the prominent idea in the minds of the framers of the constitution when to congress was committed the power to regulate commerce among the several states. A power to prevent embarrassing restrictions by any state was the thing desired. The power was given by the same words, and in the same clause, by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the state to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade, either with foreign nations or among the states. * * * Nor does it make any difference whether this interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce. Among the states it must have been principally by land when the constitution was adopted." Case of the State Freight Tax, 15 Wall. 232, 275, per Mr. Justice Strong. It was therefore decided, in that case, that a tax upon freight transported from state to state was a regulation of interstate transportation, and for that reason a regulation of commerce among the states. And this conclusion was reached notwithstanding the fact that congress had not legislated on the subject, and notwithstanding the inference sought to be drawn from the fact that it was thereby left open to the legislation of the several states. On that point it was said by Mr. Justice Strong, speaking for the court, as follows (page 279): "Cases that have sustained state laws, alleged to be regulations of commerce among the states, have been such as related to bridges or dams across streams wholly within a state, police or health laws, or subjects of a kindred nature, not strictly of commercial regulations. The subjects were such as in Gilman v. Philadelphia, 3 Wall. 713, it was said 'can be best regulated by rules and provisions suggested by the varying circumstances of different localities and limited in their operation to such localities respectively.' However this may be, the rule has been asserted with great clearness that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admitting of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by congress. Cooley v. Board of Wardens, 12 How. 299; Crandall v. State, 6 Wall. 42. Surely transportation of passengers or merchandise through a state, or from one state to another, is of this nature. It is of national importance that over that subject there should be but one regulating power; for if one state can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between states remote from each other may be destroyed. The produce of Western states may thus be effectually excluded from Eastern markets; for, though it might bear the imposition of a single tax, it would be crushed under a load of many. It was to guard against the possibility of such commercial embarrassments, no doubt, that the power of regulating commerce among the states was conferred upon the federal government." The distinction between cases in which congress has exerted its power over commerce, and those in which it has abstained from its exercise, as bearing upon state legislation touching the subject, was first plainly pointed out by Mr. Justice Curtis in the case of Cooley v. Board of Wardens, 12 How. 299, 318, and applies to commerce with foreign

nations, as well as to commerce among the states. In that case, speaking of commerce with foreign nations, he said (page 319): "Now, the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various, subjects, quite unlike in their nature,—some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation." It was therefore held, in that case, that the laws of the several states concerning pilotage, although in their nature regulations of foreign commerce, were, in the absence of legislation on the same subject by congress, valid exercises of power. The subject was local, and not national, and was likely to be best provided for, not by one system or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits; and to this it may be added that it was a subject imperatively demanding positive regulation. The absence of legislation on the subject, therefore, by congress, was evidence of its opinion that the matter might be best regulated by local authority, and proof of its intention that local regulations might be made.

It may be argued, however, that aside from such regulations as these, which are purely local, the inference to be drawn from the absence of legislation by congress on the subject excludes state legislation affecting commerce with foreign nations more strongly than that affecting commerce among the states. Laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation. The organization of our state and federal system of government is such that the people of the several states can have no relations with foreign powers in respect to commerce, or any other subject, except through the government of the United States, and its laws and treaties. Henderson v. Mayor of New York, 92 U. S. 259, 273. The same necessity, perhaps, does not exist equally in reference to commerce among the states. The power conferred upon congress to regulate commerce among the states is indeed contained in the same clause of the constitution which confers upon it power to regulate commerce with foreign nations. The grant is conceived in the same terms, and the two powers are undoubtedly of the same class and character, and equally extensive. The actual exercise of its power over either subject is equally and necessarily exclusive of that of the states, and paramount over all the powers of the states; so that state legislation, however legitimate in its origin or object, when it conflicts with the positive legislation of congress, or its intention, reasonably implied from its silence, in respect to the subject of commerce of both kinds must fail. And yet, in respect to commerce among the states, it may be, for the reason already assigned, that the same inference is not always to be drawn from the absence of congressional legislation, as might be in the case of commerce with foreign nations. The question, therefore, may be still considered in each case as it arises, whether the fact that congress has failed in the particular instance to provide by law a regulation of commerce among the states is conclusive of its intention that the subject shall be free from all positive regulation, or that, until it positively interferes, such commerce may be left to be freely dealt with by the respective states. We have seen that in the Case of the State Freight Tax, 15 Wall. 232, a tax imposed by one state upon freight transported to or from another state was held to be void, as a regulation of commerce among the states, on the ground that the transportation of passengers or merchandise through a state, or from one state to another, was in its nature national; so that it should be subjected to one uniform system or plan of regulation, under the control of one regulating power. In that case the tax was not imposed for the purpose of regulating interstate commerce, but in order to raise a revenue, and would have been a legitimate exercise of an admitted power of the state if it had not been exerted so as to operate as a regulation of interstate commerce. Any other regulation of interstate commerce, applied as the tax was in that case, would fall equally within the rule of its decision. If the state has not power to tax freight and passengers passing through it, or to or from it, from or into another state, much less would it have the power directly to regulate such transportation, or to forbid it altogether. If, in the present case, the law of Iowa operated upon all merchandise sought to be brought from another state into its limits, there could be no doubt that it would be a regulation of commerce among the states, and repugnant to the constitution of the United States. In point of fact, however, it applies only to one class of articles of a particular kind, and prohibits their introduction into the state upon special grounds. It remains for us to consider whether those grounds are sufficient to justify it as an exception from the rule which would govern if they did not exist.

It may be material, also, to state, in this connection, that congress had legislated on the general subject of interstate commerce by means of railroads prior to the date of the transaction on which the present suit is founded. Section 5258, Rev. St., provides that "every railroad company in the United States, whose road is operated by steam, its successors and assigns, is hereby authorized

to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination." In the case of Railroad Co. v. Richmond, 19 Wall. 584, this section, then constituting a part of the act of congress of June 15, 1866, was considered. Referring to this act and the act of July 25, 1866, authorizing the construction of bridges over the Mississippi river, the court say: "These acts were passed under the power vested in congress to regulate commerce among the several states, and were designed to remove trammels upon transportation between different states which had previously existed, and to prevent a creation of such trammels in future, and to facilitate railway transportation by authorizing the construction of bridges over the navigable waters of the Mississippi, and they were intended to reach trammels interposed by state enactments or by existing laws of congress. * * * The power to regulate commerce among the several states was vested in congress, in order to secure equality and freedom in commercial intercourse against discriminating state legislation." Congress had also legislated on the subject of the transportation of passengers and merchandise in chapter 6, tit. 48, Rev. St.; sections 4252 to 4289, inclusive, having reference, however, mainly to transportation in vessels by water. But sections 4278 and 4279 relate also to the transportation of nitro-glycerin, and other similar explosive substances, by land or water, and either as a matter of commerce with foreign countries, or among the several states. Section 4280 provides that "the two preceding sections shall not be so construed as to prevent any state, territory, district, city, or town within the United States from regulating or from prohibiting the traffic in or transportation of those substances between persons or places lying or being within their respective territorial limits, or from prohibiting the introduction thereof into such limits for sale, use, or consumption therein." So far as these regulations made by congress extend, they are certainly indications of its intention that the transportation of commodities between the states shall be free, except where it is positively restricted by congress itself, or by the states in particular cases by the express permission of congress. On this point the language of this court in the case of County of Mobile v. Kimball, 102 U. S. 691, 697, is applicable. Repeating and expanding the idea expressed in the opinion in the case of Cooley v. Board of Wardens, 12 How. 299, this court said: "The subjects, indeed, upon which congress can act under this power, are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the states; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. In the former class may be mentioned all that portion of commerce with foreign countries or between the states which consists in the transportation, purchase, sale, and exchange of commodities. Here, there can of necessity be only one system or plan of regulations; and that, congress alone can prescribe. Its non-action, in such cases, with respect to any particular commodity or mode of transportation, is a declaration of its purpose that the commerce in that commodity, or by that means of transportation, shall be free. There would otherwise be no security against conflicting regulations of different states; each discriminating in favor of its own products, and against the products of citizens of other states. And it is a matter of public history that the object of vesting in congress the power to regulate commerce with foreign nations and among the states was to insure uniformity of regulation against conflicting and discriminating state legislation." Also (page 702): "Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic; including, in these terms, navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce, as thus defined, there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate states is not, therefore, permissible."

The principle thus announced has a more obvious application to the circumstances of such a case as the present, when it is considered that the law of the state of Iowa under consideration, while it professes to regulate the conduct of carriers engaged in transportation within the limits of that state, nevertheless materially affects, if allowed to operate, the conduct of such carriers, both as respects their rights and obligations, in every other state into or through which they pass, in the prosecution of their business of interstate transportation. In the present case, the defendant is sued as a common carrier in the state of Illinois, and the breach of duty alleged against it is a violation of the law of that state in refusing to receive and transport goods which, as a common carrier, by that law, it was bound to accept and carry. It interposes as a defense a law of the state of Iowa which forbids the delivery of such goods within that state. Has the law of Iowa any extraterritorial force which does not belong to the law of the state of Illinois? If the law of Iowa forbids the de-

livery, and the law of Illinois requires the transportation, which of the two shall prevail? How can the former make void the latter? In view of this necessary operation of the law of Iowa, if it be valid, the language of this court in the case of Hall v. De Cuir, 95 U. S. 485, 488, is exactly in point. It was there said: "But we think it may safely be said that state legislation, which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without, or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the state, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up within and put down without. A passenger in the cabin set apart for the use of whites without the state must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced. It was to meet just such a case that the commercial clause in the constitution was adopted. The river Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers, and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the state, in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and, to secure it, congress, which is untrammeled by state lines, has been vested with the exclusive legislative power of determining what such regulations shall be."

It is impossible to justify this statute of Iowa by classifying it as an inspection law. The right of the states to pass inspection laws is expressly recognized in article 1, § 10, Const., in the clause declaring that "no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." * * * "And all such laws shall be subject to the revision and control of the congress." The nature and character of the inspection laws of the states, contemplated by this provision of the constitution, were very fully exhibited in the case of Turner v. Maryland, 107 U. S. 38, 2 Sup. Ct. 44. "The object of inspection laws," said Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 1, 203, "is to improve the quality of articles produced by the labor of a country, to fit them for exportation, or, it may be, for domestic use. They act upon the subject, before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose." They are confined to such particulars as in the estimation of the legislature, and according to the customs of trade, are deemed necessary to fit the inspected article for the market, by giving to the purchaser public assurance that the article is in that condition, and of that quality, which makes it merchantable, and fit for use or consumption. They are not founded on the idea that the things in respect to which inspection is required, are dangerous or noxious in themselves. As was said in Turner v. Maryland, 107 U. S. 38, 55, 2 Sup. Ct. 44, 58: "Recognized elements of inspection laws have always been quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds; all these matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise, as it did or did not answer the prescribed requirements. It has never been regarded as necessary, and it is manifestly not necessary, that all of these elements should co-exist, in order to make a valid inspection law. Quality alone may be the subject of inspection, without other requirement, or the inspection may be made to extend to all of the above matters." It has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature, and the injurious consequences of its use or abuse.

For similar reasons the statute of Iowa under consideration cannot be regarded as a regulation of quarantine, or a sanitary provision for the purpose of protecting the physical health of the community, or a law

to prevent the introduction into the state of disease, contagious, infectious, or otherwise. Doubtless, the states have power to provide by law suitable measures to prevent the introduction into the states of articles of trade which, on account of their existing condition, would bring in and spread disease, pestilence, and death; such as rags or other substances infected with the germs of yellow fever, or the virus of small-pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption. Such articles are not merchantable. They are not legitimate subjects of trade and commerce. They may be rightly outlawed, as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each state, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the constitution. Upon this point, the observations of Mr. Justice Catron in the License Cases, 5 How. 504, 599, are very much to the point. Speaking of the police power as reserved to the states, and its relation to the power granted to congress over commerce, he said: "The assumption is that the police power was not touched by the constitution, but left to the states, as the constitution found it. This is admitted; and whenever a thing, from character or condition, is of a description to be regulated by that power in the state, then the regulation may be made by the state, and congress cannot interfere. But this must always depend on facts subject to legal ascertainment, so that the injured may have redress. And the fact must find its support in this, whether the prohibited article belongs to, and is subject to be regulated as part of, foreign commerce, or of commerce among the states. If, from its nature, it does not belong to commerce, or if its condition, from putrescence or other cause, is such, when it is about to enter the state, that it no longer belongs to commerce, or, in other words, is not a commercial article, then the state power may exclude its introduction; and, as an incident to this power, a state may use means to ascertain the fact. And here is the limit between the sovereign power of the state and the federal power; that is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state, and that which does belong to commerce is within the jurisdiction of the United States. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this court in the cases of Gibbons v. Ogden, supra, Brown v. State, 12 Wheat. 419, and New York v. Miln, 11 Pet. 102. What, then, is the assumption of the state court? Undoubtedly, in effect, that the state had the power to declare what should be an article of lawful commerce in the particular state; and, having declared that ardent spirits and wines were deleterious to morals and health, they ceased to be commercial commodities there, and that then the police power attached, and consequently the powers of congress could not interfere. The exclusive state power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the state laws, and asserted as the state policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the state is attempted to be created in a case where it did not previously exist. If this be the true construction of the constitutional provision, then the paramount power of congress to regulate commerce is subject to a very material limitation; for it takes from congress, and leaves with the states, the power to determine the commodities or articles of property which are the subjects of lawful commerce. Congress may regulate, but the states determine, what shall or shall not be regulated. Upon this theory, the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated. The same process of legislation and reasoning adopted by the state and its courts could bring within the police power any article of consumption that a state might wish to exclude, whether it belonged to that which was drunk, or to food and clothing; and with nearly equal claims to propriety, as malt liquors, and the produce of fruits other than grapes, stand on no higher ground than the light wines of this and other countries, excluded, in effect, by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing." This question was considered in the case of Railroad Co. v. Husen, 95 U. S. 465, in which this court declared an act of the legislature of Missouri, which prohibited driving or conveying any Texas, Mexican, or Indian cattle into the state between the 1st day of March and the 1st day of November in each year, to be in conflict with the constitutional provision investing congress with power to regulate commerce among the several states; holding that such a statute was more than a quarantine regulation, and not a legitimate exercise of the police power of the state. In that case it was said (page 472): "While we unhesitatingly

admit that a state may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while, for the purpose of self-protection, it may establish quarantine and reasonable inspection laws,—it may not interfere with transportation into or through the state, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce. * * * The reach of the statute was far beyond its professed object, and far into the realm which is within the exclusive jurisdiction of congress. * * * The police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the federal constitution. And, as its range sometimes comes very near to the field committed by the constitution to congress, it is the duty of the courts to guard vigilantly against any needless intrusion." The same principles were declared in Henderson v. Mayor of New York, 92 U. S. 259, and Chy Lung v. Freeman, Id. 275. In the latter case, speaking of the right of the state to protect itself from the introduction of paupers and convicted criminals from abroad, the court said: "Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity." "It may also be admitted," as was said in the case of Railroad Co. v. Husen, 95 U. S. 465, 471, "that the police power of a state justifies the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace. It may exclude from its limits, convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases,—a right founded, as intimated in the Passenger Cases, 7 How. 283, by Mr. Justice Grier, in the sacred law of self-defense. Vide Neff v. Pennoyer, 3 Sawy. 283, Fed. Cas. No. 10,083. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the state; for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive. But, whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to congress by the federal constitution. It cannot invade the domain of the national government. * * * Neither the unlimited powers of a state to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon congress by the constitution."

It is conceded, as we have already shown, that for the purposes of its policy a state has legislative control, exclusive of congress, within its territory of all persons, things, and transactions of strictly internal concern. For the purpose of protecting its people against the evils of intemperance, it has the right to prohibit the manufacture within its limits of intoxicating liquors. It may also prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other states or from foreign countries. It may punish those who sell them in violation of its laws. It may adopt any measures tending, even indirectly and remotely, to make the policy effective, until it passes the line of power delegated to congress under the constitution. It cannot, without the consent of congress, expressed or implied, regulate commerce between its people and those of the other states of the Union, in order to effect its end, however desirable such a regulation might be. The statute of Iowa under consideration falls within this prohibition. It is not an inspection law; it is not a quarantine or sanitary law. It is essentially a regulation of commerce among the states, within any definition heretofore given to that term, or which can be given; and, although its motive and purpose are to perfect the policy of the state of Iowa in protecting its citizens against the evils of intemperance, it is none the less on that account a regulation of commerce. If it had extended its provisions so as to prohibit the introduction into the state from foreign countries of all importations of intoxicating liquors produced abroad, no one would doubt the nature of the provision as a regulation of foreign commerce. Its nature is not changed by its application to commerce among the states. Can it be supposed that, by omitting any express declarations on the subject, congress has intended to submit to the several states the decision of the question in each locality of what shall and what shall not be articles of traffic in the interstate commerce of the country? If so, it has left to each state, according to its own caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured, or sold in any state, and sought to be introduced as an article of commerce into any other. If the state of Iowa may prohibit the importation of intoxicating liquors from all other states, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort, or peace of the community. Its policy may be directed to other ends. It may

choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures, or arts of any description, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect. The police power of the state would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace, and morals of the people. In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several states of the Union, it cannot be supposed that the constitution or congress has intended to limit the freedom of commercial intercourse among the people of the several states. "It cannot be too strongly insisted upon," said this court in Railroad Co. v. Illinois, 118 U. S. 557, 572, 7 Sup. Ct. 4, "that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the states might choose to impose upon it that the commerce clause was intended to secure. This clause, giving to congress the power to regulate commerce among the states and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the constitution. Cook v. Pennsylvania, 97 U. S. 566, 574; Brown v. Maryland, 12 Wheat. 419, 446. And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the states, which was deemed essential to a more perfect union by the framers of the constitution, if, at every stage of the transportation of goods and chattels through the country, the state within whose limits a part of the transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce." In Brown v. Houston, 114 U. S. 622, 630, 5 Sup. Ct. 1091, it was declared that the power of congress over commerce among the states "is certainly so far exclusive that no state has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the states, as congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other states, coming or brought within its jurisdiction. All laws and regulations are restrictive of natural freedom to some extent, and, where no regulation is imposed by the government which has the exclusive power to regulate, it is an indication of its will that the matter shall be left free. So long as congress does not pass any law to regulate commerce among the several states, it thereby indicates its will that that commerce shall be free and untrammeled; and any regulation of the subject by the states is repugnant to such freedom. This has frequently been laid down as law in the judgments of this court."

The present case is concluded, we think, by the judgment of this court in Walling v. Michigan, 116 U. S. 446, 6 Sup. Ct. 454. In that case an act of the legislature of the state of Michigan which imposed a tax upon persons who, not residing or having their principal place of business within the state, engaged there in the business of selling or soliciting the sale of intoxicating liquors to be shipped into the state from places without it, but did not impose a similar tax upon persons selling or soliciting the sale of intoxicating liquors manufactured in the state, was declared to be void, on the ground that it was a regulation in restraint of commerce repugnant to the constitution of the United States. In that case it was said (page 459): "It is suggested by the learned judge who delivered the opinion of the supreme court of Michigan in this case that the tax imposed by the act of 1875 is an exercise by the legislature of Michigan of the police power of the state for the discouragement of the use of intoxicating liquors, and the preservation of the health and morals of the people. This would be a perfect justification of the act if it did not discriminate against the citizens and products of other states as a matter of commerce between the states, and thus usurp one of the prerogatives of the national legislature. The police power cannot be set up to control the inhibitions of the federal constitution, or the powers of the United States government created thereby." It would be error to lay any stress on the fact that the statute passed upon in that case made a discrimination between citizens and products of other states in favor of those of the state of Michigan, notwithstanding the intimation on that point in the foregoing extract from the opinion. This appears plainly from what was decided in the case of Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592. It was there said (page 497, 120 U. S., and page 592, 7 Sup. Ct.): "It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers,—those of Tennessee, and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. This was decided in the Case of the State Freight Tax, 15 Wall. 232." In answer to another suggestion in the opinion of the supreme court of Michigan, that the regulation contained in the act did not amount to a prohibition, this court said: "We are unable to adopt the views of that learned tribunal as here expressed. It is the power to regulate commerce among the several states which the constitution in terms confers upon con-

gress; and this power, as we have seen, is exclusive in cases like the present, where the subject of regulation is one that admits and requires uniformity, and where any regulation affects the freedom of traffic among the states."

The relation of the police powers of the state to the powers granted to congress by the constitution over foreign and interstate commerce was stated by this court in the opinion in the case of Robbins v. Taxing Dist., 120 U. S. 489, 493, 7 Sup. Ct. 592, 594, as follows: "It is also an established principle, as already indicated, that the only way in which commerce between the states can be legitimately affected by state laws, is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons, and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the state, or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the constitution and laws of the United States; and the imposition of taxes upon all property within the state mingled with and forming part of the great mass of property therein. But in making such internal regulations the state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad or from another state, and not yet become a part of the common mass of property therein; and no discrimination can be made by any such regulations adversely to the persons or property of other states; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to congress over the subject. * * * In a word, it may be said that, in the matter of interstate commerce, the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by congress, is so firmly established that it is unnecessary to enlarge further upon this subject."

The section of the statute of Iowa, the validity of which is drawn in question in this case, does not fall within this enumeration of legitimate exertions of the police power. It is not an exercise of the jurisdiction of the state over persons and property within its limits; on the contrary, it is an attempt to exert that jurisdiction over persons and property within the limits of other states. It seeks to prohibit and stop their passage and importation into its own limits, and is designed as a regulation for the conduct of commerce before the merchandise is brought to its border. It is not one of those local regulations designed to aid and facilitate commerce; it is not an inspection law to secure the due quality and measure of a commodity; it is not a law to regulate or restrict the sale of an article deemed injurious to the health and morals of the community; it is not a regulation confined to the purely internal and domestic commerce of the state; it is not a restriction which only operates upon property after it has become mingled with and forms part of the mass of the property within the state. It is, on the other hand, a regulation directly affecting interstate commerce in an essential and vital point. If authorized, in the present instance, upon the grounds and motives of the policy which have dictated it, the same reason would justify any and every other state regulation of interstate commerce upon any grounds and reasons which might prompt in particular cases their adoption. It is therefore a regulation of that character which constitutes an unauthorized interference with the power given to congress over the subject. If not in contravention of any positive legislation by congress, it is nevertheless a breach and interruption of that liberty of trade which congress ordains as the national policy, by willing that it shall be free from restrictive regulations.

It may be said, however, that the right of the state to restrict or prohibit sales of intoxicating liquor within its limits, conceded to exist as a part of its police power, implies the right to prohibit its importation, because the latter is necessary to the effectual exercise of the former. The argument is that a prohibition of the sale cannot be made effective except by preventing the introduction of the subject of the sale; that, if its entrance into the state is permitted, the traffic in it cannot be suppressed. But the right to prohibit sales, so far as conceded to the states, arises only after the act of transportation has terminated, because the sales which the state may forbid are of things within its jurisdiction. Its power over them does not begin to operate until they are brought within the territorial limits which circumscribe it. It might be very convenient and useful, in the execution of the policy of prohibition within the state, to extend the powers of the state beyond its territorial limits. But such extraterritorial powers cannot be assumed upon such an implica-

tion. On the contrary, the nature of the case contradicts their existence; for, if they belong to one state, they belong to all, and cannot be exercised severally and independently. The attempt would necessarily produce that conflict and confusion which it was the very purpose of the constitution, by its delegations of national power, to prevent. It is easier to think that the right of importation from abroad, and of transportation from one state to another, includes, by necessary implication, the right of the importer to sell in unbroken packages at the place where the transit terminates; for the very purpose and motive of that branch of commerce which consists in transportation is that other and consequent act of commerce which consists in the sale and exchange of the commodities transported. Such, indeed, was the point decided in the case of Brown v. Maryland, 12 Wheat. 419, as to foreign commerce, with the express statement, in the opinion of Chief Justice Marshall, that the conclusion would be the same in a case of commerce among the states. But it is not necessary now to express any opinion upon the point, because that question does not arise in the present case. The precise line which divides the transaction, so far as it belongs to foreign or interstate commerce, from the internal and domestic commerce of the state, we are not now called upon to delineate. It is enough to say that the power to regulate or forbid the sale of a commodity, after it has been brought into the state, does not carry with it the right and power to prevent its introduction by transportation from another state.

For these reasons we are constrained to pronounce against the validity of the section of the statute of Iowa involved in this case. The judgment of the circuit court of the United States for the Northern district of Illinois is therefore reversed, and the cause remanded, with instructions to sustain the demurrer to the plea, and to take further proceedings therein in conformity with this opinion.

LAMAR, J., was not present at the argument of this case, and took no part in its decision.

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Mr. Chief Justice WAITE, Mr. Justice HARLAN, and Mr. Justice GRAY, dissenting.

FIELD, J. (concurring). I concur in the judgment of the court in this case, and in the greater part of the opinion upon which it is founded. The opinion clearly shows, as I think, that the law of Iowa prohibiting the importation into that state of intoxicating liquors is an encroachment on the power of congress over interstate commerce. That commerce is a subject of vast extent. It embraces intercourse between citizens of different states for purpose of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities. The power to regulate it, which is vested in congress in the same clause with the power to regulate commerce with foreign nations, is general in its terms. And to regulate this commerce is to prescribe the conditions under which it shall be conducted; that is, how far it shall be free, and how far subject to restrictions. The defendant is a common carrier, engaged in the transportation of freight by railway, not only between places in the state of Illinois, but also between places in different states. In the latter business it is, therefore, engaged in interstate commerce. Whatever is an article of commerce it may carry, subject to such regulations as may be necessary for the convenience and safety of the community through which its cars pass, and to insure safety in the carriage of the freight. The law of Iowa prescribing the conditions upon which certain liquors may be imported into that state is, therefore, a regulation of interstate commerce. Such regulation, where the subject, like the transportation of goods, is national in its character, can be made only by congress,—the power which can act for the whole country. Action by the states upon such commerce is not, therefore, permissible. Mobile v. Kimball, 102 U. S. 691, 697. What is an article of commerce is determinable by the usages of the commercial world, and does not depend upon the declaration of any state. The state possesses the power to prescribe all such regulations with respect to the possession, use, and sale of property within its limits as may be necessary to protect the health, lives, and morals of its people; and that power may be applied to all kinds of property, even that which in its nature is harmless. But the power of regulation for that purpose is one thing, and the power to exclude an article from commerce by a declaration that it shall not thenceforth be the subject of use and sale is another and very different thing. If the state could thus take an article from commerce, its power over interstate commerce would be superior to that of congress, where the constitution has vested it. The language of Mr. Justice Catron on this subject in the License Cases, 5 How. 600, quoted in the opinion of the court, is instructive. Speaking of the assumption by the state of the power to declare what shall and what shall not be deemed an article of commerce within its limits, and thus to permit the sale of one and prohibit the sale of the other, without reference to congressional power of regulation, the learned justice said: "The exclusive state power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the state laws, and asserted as the state policy, that it shall be excluded from commerce; and by this means the sovereign jurisdiction in the state is at-

tempted to be created in a case where it did not previously exist. If this be the true construction of the constitutional provision, then the paramount power of congress to regulate commerce is subject to a very material limitation; for it takes from congress, and leaves with the states, the power to determine the commodities or articles of property which are the subjects of lawful commerce. Congress may regulate, but the states determine what shall or shall not be regulated. Upon this theory the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated."

In Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273 (recently decided), this court held a statute of that state to be valid which prohibited the manufacture and sale within its limits of intoxicating liquors except for medical, scientific, or mechanical purposes, and made a violation of its provisions a misdemeanor punishable by fine or imprisonment. I agreed to so much of the opinion of the court in that case as asserted that there was nothing in the constitution or laws of the United States which affected the validity of the statute prohibiting the sale of such liquors manufactured in the state, except under proper regulations for the protection of the health and morals of the people. But, at the same time, I stated, without expressing any opinion on the subject, that I was not prepared to say that the state could prohibit the sale of such liquors within its limits under like regulations, if congress should authorize their importation; observing that the right to import an article of merchandise, recognized as such by the commercial world, whether the right be given by act of congress or by treaty with a foreign nation, would seem necessarily to carry the right to sell the article when imported. Where the importation is authorized from one state to another, a similar right of sale of the article imported would seem to follow. The question upon which I was then unwilling to express an opinion is presented in this case; not in a direct way, it is true, but in such a form as, it seems to me, to require consideration.

A statute of Iowa contains a prohibition, similar to that of the Kansas statute, upon the manufacture and sale of intoxicating liquors within its limits, with the additional exception of permission to use them for culinary purposes, and to sell foreign liquors imported under a law of congress, in the original casks or packages in which they are imported. The law under consideration in this case, prohibiting the importation into Iowa of such liquors from other states, without a license for that purpose, was passed to carry out the policy of the state to suppress the sale of such liquors within its limits. And the argument is pressed with much force that, if the state cannot prohibit the importation, its policy to suppress the sale will be defeated; and if legislation establishing such policy is not in conflict with the constitution of the United States, this additional measure to carry the legislation into successful operation must be permissible. The argument assumes that the right of importation carries with it the right to sell the article imported,—a position hereafter considered. The reserved powers of the states in the regulation of their internal affairs must be exercised consistently with the exercise of the powers delegated to the United States. If there be a conflict, the powers delegated must prevail, being so much authority taken from the states by the express sanction of their people; for the constitution itself declares that laws made in pursuance of it shall be the supreme law of the land. But those powers which authorize legislation touching the health, morals, good order, and peace of their people were not delegated, and are so essential to the existence and prosperity of the states that it is not to be presumed that they will be encroached upon so as to impair their reasonable exercise. How can these reserved powers be reconciled with the conceded power of congress to regulate interstate commerce? As said above, the state cannot exclude an article from commerce, and consequently from importation, simply by declaring that its policy requires such exclusion; and yet its regulations respecting the possession, use, and sale of any article of commerce may be as minute and strict as required by the nature of the article, and the liability of injury from it for the safety, health, and morals of its people. In the opinion of the court it is stated that the effect of the right of importation upon the asserted right, as a consequence thereof, to sell the article imported is not involved in this case, and therefore it is not necessary to express any opinion on the subject. The case, it is true, can be decided, and has been decided, without expressing an opinion on that subject; but with great deference to my associates, I must say that I think its consideration is presented, and to some extent required, to meet the argument that the right of importation, because carrying the right to sell the article imported, is inconsistent with the right of the state to prohibit the sale of the article absolutely, as held in the Kansas case. With respect to most subjects of commerce, regulations may be adopted touching their use and sale when imported, which will afford all the protection and security desired, without going to the extent

of absolute prohibition. It is not found difficult, even with the most dangerous articles, to provide such minute and stringent regulations as will guard the public from all harm from them. Arsenic, dynamite, powder, and nitro-glycerin are imported into every state, under such restrictions as to their transportation and sale as to render it safe to deal in them. There may be greater difficulty in regulating the use and sale of intoxicating liquors; and I admit that whenever the use of an article cannot be regulated and controlled so as to insure the health and safety of society, it may be prohibited, and the article destroyed.

That the right of importation carries with it the right to sell the article imported does not appear to me doubtful. Of course I am speaking of an article that is in a healthy condition, for when it has become putrescent or diseased it has ceased to be an article of commerce, and it may be destroyed, or its use prohibited. To assert that, under the constitution of the United States, the importation of an article of commerce cannot be prohibited by the states, and yet to hold that when imported its use and sale can be prohibited, is to declare that the right which the constitution gives is a barren one, to be used only so far as the burden of transportation is concerned, and to be denied so far as any benefits from such transportation are sought. The framers of the constitution never intended that a right given should not be fully enjoyed. In Brown v. Maryland, 12 Wheat. 447, Chief Justice Marshall, in delivering the opinion of the court, speaking of the commercial power of congress, and after observing that it is co-extensive with the subject on which it acts, and cannot be stopped at the exterior boundary of a state, but must enter its interior, said: "If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence, of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell. * * * The power claimed by the state is, in its nature, in conflict with that given to congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence. We think, then, that if the power to authorize a sale exists in congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable." And the chief justice added: "We suppose the principles laid down in this case to apply equally to importations from a sister state." Page 449.

Assuming, therefore, as correct doctrine, that the right of importation carries the right to sell the article imported, the decision in the Kansas case may perhaps be reconciled with the one in this case by distinguishing the power of the state over property created within it, and its power over property imported; its power in one case extending, for the protection of the health, morals, and safety of its people, to the absolute prohibition of the sale or use of the article, and in the other extending only to such regulations as may be necessary for the safety of the community, until it has been incorporated into and become a part of the general property of the state. However much this distinction may be open to criticism, it furnishes, as it seems to me, the only way in which the two decisions can be reconciled. There is great difficulty in drawing the line precisely where the commercial power of congress ends, and the power of the state begins. The same difficulty was experienced in Brown v. Maryland, in drawing a line between the restriction on the states to lay a duty on imports and their acknowledged power to tax persons and property. In that case the court said that the two,—the power and the restriction,—though distinguishable when they did not approach each other, might, like the intervening colors between white and black, approach so nearly as to perplex the understanding as colors perplex the vision, in marking the distinction between them; but as the distinction existed, it must be marked as the cases arise. And after observing that it might be premature to state any rule as being universal in its application, the court held as sufficient for that case that when the importer had so acted upon the thing imported that it had become incorporated and mixed up with the mass of property in the country, it had lost its distinctive character as an import, and had become subject to the taxing power of the state; but that while remaining the property of the importer, in his warehouse in the original form or package in which it was imported, a tax upon it was plainly a duty on imports. So, in the present case, it is perhaps impossible to state any rule which would determine in all cases where the right to sell an imported article under the commercial power of the federal government ends, and the power of the state to restrict further sale has commenced. Perhaps no safer rule can be adopted than the one laid down in Brown

v. Maryland, that the commercial power continues until the articles imported have become mingled with and incorporated into the general property of the state, and not afterwards. And yet it is evident that the value of the importation will be materially affected if the article imported ceases to be under the protection of the commercial power upon its sale by the importer. There will be little inducement for one to purchase from the importer, if immediately afterwards he can himself be restrained from selling the article imported; and yet the power of the state must attach when the imported article has become mingled with the general property within its limits, or its entire independence in the regulation of its internal affairs must be abandoned. The difficulty and embarrassment which may follow must be met as each case arises.

In the License Cases, reported in 5 How. 600, this court held that the states could not only regulate the sales of imported liquors, but could prohibit their sale. The judges differed in their views in some particulars, but the majority were of opinion that the states had authority to legislate upon subjects of interstate commerce until congress had acted upon them; and as congress had not acted, the regulation of the states was valid. The doctrine thus declared has been modified since by repeated decisions. The doctrine now firmly established is that, where the subject upon which congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers, and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the state can act until congress interferes, and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state into another, congress can alone act upon it, and provide the needed regulations. The absence of any law of congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the states shall be unrestricted. It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the state, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled. Cooley v. Board, etc., 12 How. 299, 319; State Freight Tax Cases, 15 Wall. 232, 271; Welton v. Missouri, 91 U. S. 275–282; Railroad Co. v. Husen, 95 U. S. 465, 469; Mobile v. Kimball, 102 U. S. 691, 697; Ferry Co. v. Pennsylvania, 114 U. S. 196, 203, 5 Sup. Ct. 826; Brown v. Houston, 114 U. S. 622, 631, 5 Sup. Ct. 1091; Walling v. Michigan, 116 U. S. 446, 455, 6 Sup. Ct. 454; Pickard v. Car Co., 117 U. S. 34, 6 Sup. Ct. 635; Railway Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4; Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592. It is a matter of history that one of the great objects of the formation of the constitution was to secure uniformity of commercial regulations, and thus put an end to destructive and hostile discriminations by one state against the products of other states, and against their importation and sale. "It may be doubted," says Chief Justice Marshall, "whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which induced the present system than the deep and general conviction that commerce ought to be regulated by congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states. To construe the power so as to impair its efficacy would tend to defeat an object, in the attainment of which the American government took, and justly took, that strong interest which arose from a full conviction as to its necessity." Brown v. Maryland, 12 Wheat. 446. To these views I may add, that if the states have the power asserted, to exclude from importation within their limits any articles of commerce because in their judgment the articles may be injurious to their interests or policy, they may prescribe conditions upon which such importation will be admitted, and thus establish a system of duties as hostile to free commerce among the states as any that existed previous to the adoption of the constitution.

GIBBONS v. OGDEN.[1]

(9 Wheat. 1.)

Supreme Court of the United States. Feb. Term, 1824.

This was a bill filed by Aaron Ogden in the court of chancery of the state of New York against Thomas Gibbons to enjoin defendant from navigating the waters of the state of New York with boats propelled by fire or steam. Complainant asserted an exclusive right to navigate those waters by boats of that description, as assignee of the right created by several acts of the legislature of the state of New York securing that privilege to Robert R. Livingston and Robert Fulton. There was a decree for complainant, which was affirmed by the court for the trial of impeachments and correction of errors of the state of New York, and defendant brought error. Reversed and bill dismissed.

Webster and Wirt, Atty. Gen., for plaintiff. Oakley & Emmett, for defendant.

Mr. Chief Justice MARSHALL delivered the opinion of the court.

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains, are repugnant to the constitution and laws of the United States.

They are said to be repugnant—

1. To that clause in the constitution which authorizes congress to regulate commerce.

2. To that which authorizes congress to promote the progress of science and useful arts.

The state of New York maintains the constitutionality of these laws; and their legislature, their council of revision, and their judges, have repeatedly concurred in this opinion. It is supported by great names—by names which have all the titles to consideration that virtue, intelligence, and office, can bestow. No tribunal can approach the decision of this question, without feeling a just and real respect for that opinion which is sustained by such authority; but it is the province of this court, while it respects, not to bow to it implicitly; and the judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them, with that independence which the people of the United States expect from this department of the government.

As preliminary to the very able discussions of the constitution which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these states, anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the states appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded. As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects for which it was given,

[1] Opinion of Mr. Justice Johnson omitted.

especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the grantee; but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.

The words are: "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce," to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.

If the opinion that "commerce," as the word is used in the constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself.

It is a rule of construction acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted—that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

The 9th section of the 1st article declares that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one state, be obliged to enter, clear, or pay duties, in another." These words have a direct reference to navigation.

The universally acknowledged power of the government to impose embargoes, must also be considered as showing that all America is united in that construction which comprehends navigation in the word commerce. Gentlemen have said, in argument, that this is a branch of the war-making power, and that an embargo is an instrument of war, not a regulation of trade.

That it may be, and often is, used as an instrument of war, cannot be denied. An embargo may be imposed for the purpose of facilitating the equipment or manning of a fleet, or for the purpose of concealing the progress of an expedition preparing to sail from a particular port. In these, and in similar cases, it is a military instrument, and partakes of the nature of war. But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such case, an embargo is no more a war measure than a merchantman is a ship of war, because both are vessels which navigate the ocean with sails and seamen.

When congress imposed that embargo which, for a time, engaged the attention of

every man in the United States, the avowed object of the law was, the protection of commerce, and the avoiding of war. By its friends and its enemies it was treated as a commercial, not as a war measure. The persevering earnestness and zeal with which it was opposed, in a part of our country which supposed its interests to be vitally affected by the act, cannot be forgotten. A want of acuteness in discovering objections to a measure to which they felt the most deep-rooted hostility, will not be imputed to those who were arrayed in opposition to this. Yet they never suspected that navigation was no branch of trade, and was, therefore, not comprehended in the power to regulate commerce. They did, indeed, contest the constitutionality of the act, but, on a principle which admits the construction for which the appellant contends. They denied that the particular law in question was made in pursuance of the constitution, not because the power could not act directly on vessels, but because a perpetual embargo was the annihilation, and not the regulation of commerce. In terms, they admitted the applicability of the words used in the constitution to vessels; and that, in a case which produced a degree and an extent of excitement, calculated to draw forth every principle on which legitimate resistance could be sustained. No example could more strongly illustrate the universal understanding of the American people on this subject.

The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation, within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several states, and with the Indian tribes."

It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term.

If this be the admitted meaning of the word, in its application to foreign nations, it mush carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied, is to commerce "among the several states." The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the states, cannot stop at the external boundary line of each state, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

But, in regulating commerce with foreign nations, the power of congress does not stop at the jurisdictional lines of the several states. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every state in the Union, and furnish the means of exercising this right. If congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of congress may be exercised within a state.

This principle is, if possible, still more clear, when applied to commerce "among the several states." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other states lie between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining states, commence and terminate outside of each? And if the trading intercourse be between two states remote from each other, must it not commence in one, terminate in the other, and probably pass through a third?

Commerce among the states, must, of necessity, be commerce with the states. In the regulation of trade with the Indian tribes, the action of the law, especially when the constitution was made, was chiefly within a state. The power of congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states. The sense of the nation on this subject, is unequivocally manifested by the provisions made in the laws for transporting goods, by land, between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry—what is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

The power of congress, then, comprehends navigation within the limits of every state in the Union, so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several states, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness that, although the power of congress to regulate commerce with foreign nations, and among the several states, be coextensive with the subject itself, and have no other limits than are prescribed in the constitution, yet the states may severally exercise the same power, within their respective jurisdictions. In support of this argument, it is said that they possessed it as an inseparable attribute of sovereignty, before the formation of the constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description.

The appellant, conceding these postulates, except the last, contends that full power to regulate a particular subject, implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it.

Both parties have appealed to the constitution, to legislative acts, and judicial decisions; and have drawn arguments from all these sources, to support and illustrate the propositions they respectively maintain.

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the states; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised by the states are transferred to the government of the Union, yet the state governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, &c., to pay the debts, and provide for the common defence and general welfare, of the United States. This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states, an exercise of any portion of the power that is granted to the United States. In imposing taxes for state purposes, they are not doing what congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to congress, and is doing the very thing

which congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

In discussing the question whether this power is still in the states, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to congress, or is retained until congress shall exercise the power. We may dismiss that inquiry because it has been exercised, and the regulations which congress deemed it proper to make, are now in full operation. The sole question is, can a state regulate commerce with foreign nations and among the states, while congress is regulating it?

The counsel for the respondent answer this question in the affirmative, and rely very much on the restrictions in the 10th section as supporting their opinion. They say, very truly, that limitations of a power furnish a strong argument in favor of the existence of that power, and that the section which prohibits the states from laying duties on imports or exports, proves that this power might have been exercised, had it not been expressly forbidden; and, consequently, that any other commercial regulation not expressly forbidden, to which the original power of the state was competent, may still be made.

That this restriction shows the opinion of the convention, that a state might impose duties on exports and imports if not expressly forbidden will be conceded; but that it follows as a consequence, from this concession, that a state may regulate commerce with foreign nations and among the states, cannot be admitted.

We must first determine whether the act of laying "duties or imposts on imports or exports," is considered in the constitution as a branch of the taxing power, or of the power to regulate commerce. We think it very clear, that it is considered as a branch of the taxing power. It is so treated in the first clause of the 8th section: "Congress shall have power to lay and collect taxes, duties, imposts, and excises;" and before commerce is mentioned, the rule by which the exercise of this power must be governed is declared. It is, that all duties, imposts, and excises, shall be uniform. In a separate clause of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power not before conferred. The constitution, then, considers these powers as substantive, and distinct from each other; and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the states on that subject; and they might, consequently, have exercised it by levying duties on imports or exports, had the constitution contained no prohibition on this subject. This prohibition, then, is an exception from the acknowledged power of the states to levy taxes, not from the questionable power to regulate commerce.

"A duty of tonnage" is as much a tax as a duty on imports or exports; and the reason which induced the prohibition of those taxes extends to this also. This tax may be imposed by a state with the consent of congress; and it may be admitted that congress cannot give a right to a state in virtue of its own powers. But a duty of tonnage being part of the power of imposing taxes, its prohibition may certainly be made to depend on congress, without affording any implication respecting a power to regulate commerce. It is true that duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce; but they may be also imposed with a view to revenue; and it was, therefore, a prudent precaution to prohibit the states from exercising this power. The idea that the same measure might, according to circumstances, be arranged with different classes of power, was no novelty to the framers of our constitution. Those illustrious statesmen and patriots had been, many of them, deeply engaged in the discussions which preceded the war of our Revolution, and all of them were well read in those discussions. The right to regulate commerce, even by the imposition of duties, was not controverted; but the right to impose a duty for the purpose of revenue, produced a war as important, perhaps, in its consequences to the human race, as any the world has ever witnessed.

These restrictions, then, are on the taxing power, not on that to regulate commerce; and presuppose the existence of that which they restrain, not of that which they do not purport to restrain.

But the inspection laws are said to be regulations of commerce, and are certainly recognized in the constitution as being passed in the exercise of a power remaining with the states.

That inspection laws may have a remote and considerable influence on commerce will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces every thing within the territory of a state, not surrendered to a general government; all which can be most advantageous-

ly exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, &c., are component parts of this mass.

No direct general power over these objects is granted to congress; and, consequently, they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the states, may use means that may also be employed by a state, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the state. If congress license vessels to sail from one port to another in the same state, the act is supposed to be, necessarily, incidental to the power expressly granted to congress, and implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police. So if a state, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the state, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality

In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers, would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other.

The acts of congress, passed in 1796, and 1799 (1 Stat. 474, 619), empowering and directing the officers of the general government to conform to, and assist in the execution of the quarantine and health laws of a state, proceed, it is said, upon the idea that these laws are constitutional. It is undoubtedly true that they do proceed upon that idea; and the constitutionality of such laws has never, so far as we are informed, been denied. But they do not imply an acknowledgment that a state may rightfully regulate commerce with foreign nations, or among the states; for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the acts of congress, and are considered as flowing from the acknowledged power of a state, to provide for the health of its citizens. But as it was apparent that some of the provisions made for this purpose, and in virtue of this power, might interfere with, and be affected by the laws of the United States, made for the regulation of commerce, congress, in that spirit of harmony and conciliation, which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the states bear to each other, has directed its officers to aid in the execution of these laws; and has, in some measure, adapted its own legislation to this object, by making provisions in aid of those of the states. But in making these provisions the opinion is unequivocally manifested, that congress may control the state laws, so far as it may be necessary to control them, for the regulation of commerce.

The act passed in 1803 (3 Stat. p. 529), prohibiting the importation of slaves into any state which shall itself prohibit their importation, implies, it is said, an admission, that the states possessed the power to exclude or admit them; from which it is inferred that they possess the same power with respect to other articles.

If this inference were correct; if this power was exercised, not under any particular clause in the constitution, but in virtue of a general right over the subject of commerce, to exist as long as the constitution itself, it might now be exercised. Any state might now import African slaves into its own territory. But it is obvious that the power of the states over this subject, previous to the year 1808, constitutes an exception to the power of congress to regulate commerce, and the exception is expressed in such words as to manifest clearly the intention to continue the preëxisting right of the states to admit or exclude for a limited period. The words are, "the migration or importation of such persons as any of the states now existing, shall think proper to admit, shall not be prohibited by the congress prior to the year 1808." The whole object of the exception is, to preserve the power to those states which might be disposed to exercise it; and its language seems to the court to convey this idea unequivocally. The possession of this particular power then, during the time limited in the constitution, cannot be admitted to

prove the possession of any other similar power.

It has been said that the act of August 7, 1789 (1 Stat. 54), acknowledges a concurrent power in the states to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with congress to regulate commerce with foreign nations, and amongst the states. But this inference is not, we think, justified by the fact.

Although congress cannot enable a state to legislate, congress may adopt the provisions of a state on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every state. The act which has been mentioned, adopts this system, and gives it the same validity as if its provisions had been specially made by congress. But the act, it may be said, is prospective also, and the adoption of laws to be made in future, presupposes the right in the maker to legislate on the subject.

The act unquestionably manifests an intention to leave this subject entirely to the states, until congress should think proper to interpose; but the very enactment of such a law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things, unless expressly applied to it by congress. But this section is confined to pilots within the "bays, inlets, rivers, harbors, and ports of the United States," which are, of course, in whole or in part, also within the limits of some particular state. The acknowledged power of a state to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject, to a considerable extent; and the adoption of its system by congress, and the application of it to the whole subject of commerce, does not seem to the court to imply a right in the states so to apply it of their own authority. But the adoption of the state system being temporary, being only "until further legislative provision shall be made by congress," shows, conclusively, an opinion that congress could control the whole subject, and might adopt the system of the states, or provide one of its own.

A state, it is said, or even a private citizen, may construct lighthouses. But gentlemen must be aware that, if this proves a power in a state to regulate commerce, it proves that the same power is in the citizen. States, or individuals who own lands, may, if not forbidden by law, erect on those lands what buildings they please; but this power is entirely distinct from that of regulating commerce, and may, we presume, be restrained, if exercised so as to produce a public mischief.

These acts were cited at the bar for the purpose of showing an opinion in congress that the states possess, concurrently with the legislature of the Union, the power to regulate commerce with foreign nations and among the states. Upon reviewing them, we think they do not establish the proposition they were intended to prove. They show the opinion that the states retain powers enabling them to pass the laws to which allusion has been made, not that those laws proceed from the particular power which has been delegated to congress.

It has been contended, by the counsel for the appellant, that, as the word to "regulate" implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

There is great force in this argument, and the court is not satisfied that it has been refuted.

Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the states may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of congress passed in pursuance of the constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that state, have, in their application to this case, come into collision with an act of congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several states," or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous.

This opinion has been frequently expressed in this court, and is founded as well on the nature of the government as on the words of the constitution. In argument, however, it has been contended that, if a law passed by a state, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by congress in pursuance of the constitution, they affect the subject, and each other, like equal opposing powers.

But the framers of our constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the constitution, is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy

on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are contrary to the laws of congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it.

In pursuing this inquiry at the bar, it has been said that the constitution does not confer the right of intercourse between state and state. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The constitution found it an existing right, and gave to congress the power to regulate it. In the exercise of this power, congress has passed "An act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The counsel for the respondent contend, that this act does not give the right to sail from port to port, but confines itself to regulating a preëxisting right, so far only as to confer certain privileges on enrolled and licensed vessels, in its exercise.

It will at once occur that, when a legislature attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the law must imply a power to exercise the right. The privileges are gone if the right itself be annihilated. It would be contrary to all reason, and to the course of human affairs, to say that a state is unable to strip a vessel of the particular privileges attendant on the exercise of a right, and yet may annul the right itself; that the state of New York cannot prevent an enrolled and licensed vessel, proceeding from Elizabethtown, in New Jersey, to New York, from enjoying, in her course and on her entrance into port, all the privileges conferred by the act of congress; but can shut her up in her own port, and prohibit altogether her entering the waters and ports of another state. To the court it seems very clear that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies, unequivocally, an authority to licensed vessels to carry on the coasting trade.

But we will proceed briefly to notice those sections which bear more directly on the subject.

The first section declares that vessels enrolled by virtue of a previous law, and certain other vessels, enrolled as described in that act, and having a license in force, as is by the act required, "and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade."

This section seems to the court to contain a positive enactment that the vessels it describes shall be entitled to the privileges of ships or vessels employed in the coasting trade. These privileges cannot be separated from the trade, and cannot be enjoyed, unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which its whole value consists. To construe these words otherwise than as entitling the ships or vessels described, to carry on the coasting trade, would be, we think, to disregard the apparent intent of the act.

The 4th section directs the proper officer to grant to a vessel qualified to receive it, "a license for carrying on the coasting trade;" and prescribes its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are "License is hereby granted for the said steam-boat Bellona, to be employed in carrying on the coasting trade for one year from the date hereof, and no longer."

These are not the words of the officer; they are the words of the legislature; and convey as explicitly the authority the act intended to give, and operate as effectually, as if they had been inserted in any other part of the act, than in the license itself.

The word "license," means permission, or authority; and a license to do any particular thing, is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do what is within the terms of the license.

Would the validity or effect of such an instrument be questioned by the respondent, if executed by persons claiming regularly under the laws of New York?

The license must be understood to be what it purports to be, a legislative authority to the steam-boat Bellona, "to be employed in carrying on the coasting trade, for one year from this date."

It has been denied that these words authorize a voyage from New Jersey to New York. It is true, that no ports are specified; but it is equally true, that the words used are perfectly intelligible, and do confer such authority as unquestionably, as if the ports had been mentioned. The coasting trade is a term well understood. The law has defined it; and all know its meaning perfectly. The act describes, with great minuteness, the various operations of a vessel engaged in it; and it cannot, we think, be doubted, that a voyage from New Jersey to New York, is one of those operations.

Notwithstanding the decided language of the license, it has also been maintained, that it gives no right to trade; and that its sole purpose is to confer the American character.

The answer given to this argument, that

the American character is conferred by the enrolment, and not by the license, is, we think, founded too clearly in the words of the law, to require the support of any additional observations. The enrolment of vessels designed for the coasting trade, corresponds precisely with the registration of vessels designed for the foreign trade, and requires every circumstance which can constitute the American character. The license can be granted only to vessels already enrolled, if they be of the burden of twenty tons and upwards; and requires no circumstance essential to the American character. The object of the license, then, cannot be to ascertain the character of the vessel, but to do what it professes to do, that is, to give permission to a vessel already proved by her enrolment to be American, to carry on the coasting trade.

But if the license be a permit to carry on the coasting trade, the respondent denies that these boats were engaged in that trade, or that the decree under consideration has restrained them from prosecuting it. The boats of the appellant were, we are told, employed in the transportation of passengers; and this is no part of that commerce which congress may regulate.

If, as our whole course of legislation on this subject shows, the power of congress has been universally understood in America, to comprehend navigation, it is a very persuasive, if not a conclusive argument, to prove that the construction is correct; and if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hire. The subject is transferred to congress, and no exception to the grant can be admitted, which is not proved by the words or the nature of the thing. A coasting vessel employed in the transportation of passengers, is as much a portion of the American marine, as one employed in the transportation of a cargo; and no reason is perceived why such vessel should be withdrawn from the regulating power of that government, which has been thought best fitted for the purpose generally. The provisions of the law respecting native seamen, and respecting ownership, are as applicable to vessels carrying men, as to vessels carrying manufactures; and no reason is perceived why the power over the subject should not be placed in the same hands. The argument urged at the bar, rests on the foundation that the power of congress does not extend to navigation, as a branch of commerce, and can only be applied to that subject incidentally and occasionally. But if that foundation be removed, we must show some plain, intelligible distinction, supported by the constitution, or by reason, for discriminating between the power of congress over vessels employed in navigating the same seas. We can perceive no such distinction.

If we refer to the constitution, the inference to be drawn from it is rather against the distinction. The section which restrains congress from prohibiting the migration or importation of such persons as any of the states may think proper to admit, until the year 1808, has always been considered as an exception from the power to regulate commerce, and certainly seems to class migration with importation. Migration applies as appropriately to voluntary, as importation does to involuntary, arrivals; and so far as an exception from a power proves its existence, this section proves that the power to regulate commerce applies equally to the regulation of vessels employed in transporting men, who pass from place to place voluntarily, and to those who pass involuntarily.

If the power reside in congress, as a portion of the general grant to regulate commerce, then acts applying that power to vessels generally, must be construed as comprehending all vessels. If none appear to be excluded by the language of the act, none can be excluded by construction. Vessels have always been employed, to a greater or less extent, in the transportation of passengers, and have never been supposed to be, on that account, withdrawn from the control or protection of congress. Packets which ply along the coast, as well as those which make voyages between Europe and America, consider the transportation of passengers as an important part of their business. Yet it has never been suspected that the general laws of navigation did not apply to them.

The Duty Act, §§ 23, 46 (1 Stat. 644, 661), contains provisions respecting passengers, and shows that vessels which transport them have the same rights, and must perform the same duties, with other vessels. They are governed by the general laws of navigation.

In the progress of things, this seems to have grown into a particular employment, and to have attracted the particular attention of government. Congress was no longer satisfied with comprehending vessels engaged specially in this business, within those provisions which were intended for vessels generally; and on the 2d of March, 1819, passed "an act regulating passenger ships and vessels." 3 Stat. 488. This wise and humane law provides for the safety and comfort of passengers, and for the communication of every thing concerning them which may interest the government, to the department of state, but makes no provision concerning the entry of the vessel, or her conduct in the waters of the United States. This, we think, shows conclusively the sense of congress, (if indeed, any evidence to that point could be required,) that the pre-existing regulations comprehended passenger ships among others; and in prescribing the same duties, the legislature must have considered them as possessing the same rights.

If, then, it were even true, that the Bellona and the Stoudinger were employed exclusively in the conveyance of passengers between

New York and New Jersey, it would not follow that this occupation did not constitute a part of the coasting trade of the United States, and was not protected by the license annexed to the answer. But we cannot perceive how the occupation of these vessels can be drawn into question, in the case before the court. The laws of New York, which grant the exclusive privilege set up by the respondent, take no notice of the employment of vessels, and relate only to the principle by which they are propelled. Those laws do not inquire whether vessels are engaged in transporting men or merchandise, but whether they are moved by steam or wind. If by the former, the waters of New York are closed against them, though their cargoes be dutiable goods, which the laws of the United States permit them to enter and deliver in New York. If by the latter, those waters are free to them, though they should carry passengers only. In conformity with the law, is the bill of the plaintiff in the state court. The bill does not complain that the Bellona and the Stoudinger carry passengers, but that they are moved by steam. This is the injury of which he complains, and is the sole injury against the continuance of which he asks relief. The bill does not even allege, specially, that those vessels were employed in the transportation of passengers, but says, generally, that they were employed "in the transportation of passengers, or otherwise." The answer avers, only, that they were employed in the coasting trade, and insists on the right to carry on any trade authorized by the license. No testimony is taken, and the writ of injunction and decree restrain these licensed vessels, not from carrying passengers, but from being moved through the waters of New York by steam, for any purpose whatever.

The questions, then, whether the conveyance of passengers be a part of the coasting trade, and whether a vessel can be protected in that occupation by a coasting license, are not, and cannot be, raised in this case. The real and sole question seems to be, whether a steam machine in actual use, deprives a vessel of the privileges conferred by a license.

In considering this question, the first idea which presents itself, is that the laws of congress for the regulation of commerce, do not look to the principle by which vessels are moved. That subject is left entirely to individual discretion; and, in that vast and complex system of legislative enactment concerning it, which embraces every thing that the legislature thought it necessary to notice, there is not, we believe, one word respecting the peculiar principle by which vessels are propelled through the water, except what may be found in a single act (2 Stat. 694), granting a particular privilege to steam-boats. With this exception, every act, either prescribing duties, or granting privileges, applies to every vessel, whether navigated by the instrumentality of wind or fire, of sails or machinery. The whole weight of proof, then, is thrown upon him who would introduce a distinction to which the words of the law give no countenance.

If the real difference could be admitted to exist between vessels carrying passengers and others, it has already been observed that there is no fact in this case which can bring up that question. And, if the occupation of steam-boats be a matter of such general notoriety that the court may be presumed to know it, although not specially informed by the record, then we deny that the transportation of passengers is their exclusive occupation. It is a matter of general history, that, in our western waters, their principal employment is the transportation of merchandise; and all know, that in the waters of the Atlantic they are frequently so employed.

But all inquiry into this subject seems to the court to be put completely at rest, by the act already mentioned, entitled, "An act for the enrolling and licensing of steam-boats."

This act authorizes a steam-boat employed, or intended to be employed, only in a river or bay of the United States, owned wholly or in part by an alien, resident within the United States, to be enrolled and licensed as if the same belonged to a citizen of the United States.

This act demonstrates the opinion of congress, that steam-boats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters, and entering ports which are free to such vessels, than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of the Union; and the act of a state inhibiting the use of either to any vessel having a license under the act of congress, comes, we think, in direct collision with that act.

As this decides the cause, it is unnecessary to enter in an examination of that part of the constitution which empowers congress to promote the progress of science and the useful arts.

The court is aware that, in stating the train of reasoning by which we have been conducted to this result, much time has been consumed in the attempt to demonstrate propositions which may have been thought axioms. It is felt that the tediousness inseparable from the endeavor to prove that which is already clear, is imputable to a considerable part of this opinion. But it was unavoidable. The conclusion to which we have come depends on a chain of principles which it was necessary to preserve unbroken; and, although some of them were thought nearly self-evident, the magnitude of the question, the weight of character belonging

to those from whose judgment we dissent, and the argument at the bar, demanded that we should assume nothing.

Powerful and ingenious minds, taking as postulates that the powers expressly granted to the government of the Union, are to be contracted by construction into the narrowest possible compass, and that the original powers of the states are retained, if any possible construction will retain them, may, by a course of well-digested but refined and metaphysical reasoning founded on these premises, explain away the constitution of our country, and leave it a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding, as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and, when sustained, to make them the tests of the arguments to be examined.

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PENSACOLA TEL. CO. v. WESTERN UNION TEL. CO.[1]

(96 U. S. 1.)

Supreme Court of the United States. Oct. Term, 1877.

Appeal from circuit court of the United States for the Northern district of Florida.

This was a bill filed by the Pensacola Telegraph Company against the Western Union Telegraph Company to enjoin the erection of a telegraph line under Act Cong. July 20, 1866, upon a right of way through counties in the state of Florida in which complainant claimed the exclusive right to erect and maintain telegraph lines by virtue of Act Fla. Dec. 11, 1866. There was a decree dismissing the bill, and complainant appealed. Affirmed.

Charles W. Jones, for appellant. Perry Belmont, contra.

Mr. Chief Justice WAITE delivered the opinion of the court.

Congress has power "to regulate commerce with foreign nations and among the several states" (Const. art. 1, § 8, par. 3); and "to establish post-offices and post-roads" (Id., par. 7). The constitution of the United States and the laws made in pursuance thereof are the supreme law of the land. Article 6, par. 2. A law of congress made in pursuance of the constitution suspends or overrides all state statutes with which it is in conflict.

Since the case of Gibbons v. Ogden, 9 Wheat. 1, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of congress. Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of congress, because, being national in their operation, they should be under the protecting care of the national government.

The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of congress to see to it that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily encumbered by state legislation.

The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of intercommunication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than eighty per cent of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movement of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information.

It is not only important to the people, but to the government. By means of it the heads of the departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by inquiry, what is transpiring anywhere that affects the interest they have in charge. Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and intercommunication comes within the controlling power of congress, certainly as against hostile state legislation. In fact, from the beginning, it seems to have been assumed that congress might aid in developing the system; for the first telegraph line of any considerable extent ever erected was built between Washington and Baltimore, only a little more than thirty years ago, with money appropriated by congress for that purpose (5 Stat. 618); and large donations of land and money have since been made to aid in the construction of other lines (12 Stat. 489, 772; 13 Stat. 365; 14 Stat. 292). It is not necessary now to inquire whether congress may assume the telegraph as part of the postal service, and exclude all others from its use. The present case is satisfied, if we find that congress has power, by appropriate legislation, to prevent the states from placing obstructions in the way of its usefulness.

The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by state lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all.

The state of Florida has attempted to confer upon a single corporation the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory. This embraces the two westernmost counties of the state, and extends from Alabama to

[1] Dissenting opinion of Mr. Justice Field omitted.

the Gulf. No telegraph line can cross the state from east to west, or from north to south, within these counties, except it passes over this territory. Within it is situated an important seaport, at which business centres, and with which those engaged in commercial pursuits have occasion more or less to communicate. The United States have there also the necessary machinery of the national government. They have a navy-yard, forts, custom-houses, courts, post-offices, and the appropriate officers for the enforcement of the laws. The legislation of Florida, if sustained, excludes all commercial intercourse by telegraph between the citizens of the other states and those residing upon this territory, except by the employment of this corporation. The United States cannot communicate with their own officers by telegraph except in the same way. The state, therefore, clearly has attempted to regulate commercial intercourse between its citizens and those of other states, and to control the transmission of all telegraphic correspondence within its own jurisdiction.

It is unnecessary to decide how far this might have been done if congress had not acted upon the same subject, for it has acted. The statute of July 24, 1866, in effect, amounts to a prohibition of all state monopolies in this particular. It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed by congress, and that corporations organized under the laws of one state for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government for this national privilege. To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the states, and is appropriate legislation to carry into execution the powers of congress over the postal service. It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide, that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.

It is insisted, however, that the statute extends only to such military and post roads as are upon the public domain; but this, we think, is not so. The language is, "Through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of congress, and over, under, or across the navigable streams or waters of the United States." There is nothing to indicate an intention of limiting the effect of the words employed, and they are, therefore, to be given their natural and ordinary signification. Read in this way, the grant evidently extends to the public domain, the military and post roads, and the navigable waters of the United States. These are all within the dominion of the national government to the extent of the national powers, and are, therefore, subject to legitimate congressional regulation. No question arises as to the authority of congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the constitution is not interfered with. Only national privileges are granted.

The state law in question, so far as it confers exclusive rights upon the Pensacola Company, is certainly in conflict with this legislation of congress. To that extent it is, therefore, inoperative as against a corporation of another state entitled to the privileges of the act of congress. Such being the case, the charter of the Pensacola Company does not exclude the Western Union Company from the occupancy of the right of way of the Pensacola and Louisville Railroad Company under the arrangement made for that purpose.

We are aware that, in Paul v. Virginia, 8 Wall. 168, this court decided that a state might exclude a corporation of another state from its jurisdiction, and that corporations are not within the clause of the constitution which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Article 4, § 2. That was not, however, the case of a corporation engaged in inter-state commerce; and enough was said by the court to show, that, if it had been, very different questions would have been presented. The language of the opinion is: "It is undoubtedly true, as stated by counsel, that the power conferred upon congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. . . . This state of facts forbids the supposition that it was intended in the grant of power to congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on: it is general, and includes alike commerce by individuals, partnerships, associations, and corporations. . . . The defect of the argument lies in the character of their (insurance companies) business. Issuing a policy of insurance is not a transaction of commerce. . . . Such con-

tracts (policies of insurance) are not interstate transactions, though the parties are domiciled in different states."

The questions thus suggested need not be considered now, because no prohibitory legislation is relied upon, except that which, as has already been seen, is inoperative. Upon principles of comity, the corporations of one state are permitted to do business in another, unless it conflicts with the law, or unjustly interferes with the rights of the citizens of the state into which they come. Under such circumstances, no citizen of a state can enjoin a foreign corporation from pursuing its business. Until the state acts in its sovereign capacity, individual citizens cannot complain. The state must determine for itself when the public good requires that its implied assent to the admission shall be withdrawn. Here, so far from withdrawing its assent, the state, by its legislation of 1874, in effect, invited foreign telegraph corporations to come in. Whether that legislation, in the absence of congressional action, would have been sufficient to authorize a foreign corporation to construct and operate a line within the two counties named, we need not decide; but we are clearly of the opinion, that, with such action and a right of way secured by private arrangement with the owner of the land, this defendant corporation cannot be excluded by the present complainant.

Decree affirmed.

Mr. Justice FIELD and Mr. Justice HUNT dissented.

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PULLMAN'S PALACE-CAR CO. v. COMMONWEALTH OF PENNSYLVANIA.[1]

(11 Sup. Ct. 876, 141 U. S. 18.)

Supreme Court of the United States. May 25, 1891.

In error to the supreme court of the tate of Pennsylvania.

This was an action brought by the state of Pennsylvania against Pullman's Palace Car Company, a corporation of Illinois, in the court of common pleas of the county of Dauphin in the state of Pennsylvania, to recover the amount of a tax settled by the auditor general and approved by the treasurer of that state for the years 1870 to 1880, inclusive, on the defendant's capital stock, taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which cars were run by the defendant in Pennsylvania bore to the whole number of miles in this and other states over which its cars were run. All these taxes were levied under successive statutes of Pennsylvania, imposing taxes on capital stock of corporations incorporated by the laws of Pennsylvania or of any other state, and doing business in Pennsylvania, computed on a certain percentage of dividends made or declared. The taxes for 1870–1874 were levied under the statute of May 1, 1868, No. 69, § 5, which applied to corporations of every kind, with certain exceptions not material to this case: and fixed the amount of the tax at half a mill on every 1 per cent. of dividend. P. L. 1868, p. 109. The taxes for 1875–1877 were levied under the statute of April 24, 1874, No. 31, § 4, which applied to all corporations in any way engaged in the transportation of freight or passengers, and fixed the tax at nine-tenths of a mill on every 1 per cent. of dividend. P. L. 1874, p. 70. The taxes for 1878–1880 were levied under the statutes of March 20, 1877, No. 5, § 3, and of June 7, 1879, No. 122, § 4, applicable to all corporations, except building associations, banks, savings institutions, and foreign insurance companies, and fixing the tax at half a mill on each 1 per cent. of dividend of 6 per cent. or more on the par value of the capital stock, and, when the dividend was less, at three mills on a valuation of the capital stock. P. L. 1877, p. 8; P. L. 1879, p. 114.

A trial by jury was waived, and the case submitted to the decision of the court, which found the following facts: "The defendant is a corporation of the state of Illinois, having its principal office in Chicago. Its business was, during all the time for which tax is charged, to furnish sleeping-coaches and parlor and dining-room cars to the various railroad companies, with which it contracted on the following terms: The defendant furnished the coaches and cars, and the railroad companies attached and made them part of their trains, no charge being made by either party against the other. The railroad companies collected the usual fare from passengers who traveled in their coaches and cars, and the defendant collected a separate charge for the use of the seats, sleeping-berths, and other conveniences. Business has been carried on continuously by the defendant in this way in Pennsylvania since February 17, 1870, and it has had about 100 coaches and cars engaged in this way in the state during that time. The cars used in this state have, during all the time for which tax is charged, been running into, through, and out of this state." Upon these facts the court held "that the proportion of the capital stock of the defendant invested and used in Pennsylvania is taxable under these acts; and that the amount of the tax may be properly ascertained by taking as a basis the proportion which the number of miles operated by the defendant in this state bears to the whole number of miles operated by it, without regard to the question whether any particular car or cars were used;" and therefore gave judgment for the state. That judgment was affirmed upon writ of error by the supreme court of the state, for reasons stated in its opinion as follows: "We think it very clear that the plaintiff in error is engaged in carrying on such a business within this commonwealth as to subject it to the statutes imposing taxation. While the tax on the capital stock of a company is a tax on its property and assets, yet the capital stock of a company and its property and assets are not identical. The coaches of the company are its property. They are operated within this state. They are daily passing from one end of the state to the other. They are used in performing the functions for which the corporation was created. The fact that they also are operated in other states cannot wholly exempt them from taxation here. It reduces the value of the property in this state, justly subject to taxation here. This was recognized in the court below, and we think the proportion was fixed according to a just and equitable rule." 107 Pa. St. 156, 160. Pullman's Palace-Car Company sued out a writ of error from this court, and filed six assignments of error, the substance of which was summed up in the brief of its counsel as follows: "The court erred in holding that any part of the capital stock of the Pullman Company was subject to taxation by the state of Pennsylvania by reason of its running any of its cars into, out of, or through the state of Pennsylvania in the course of their employment in the interstate transportation of railway passengers."

Edward S. Isham, John S. Runnells, and Wm. Barry, for plaintiff in error. W. S. Kirkpatrick and J. F. Sanderson, for the Commonwealth.

Mr. Justice GRAY, after stating the facts as above, delivered the opinion of the court.

Upon this writ of error, whether this tax was in accordance with the law of Pennsylvania is a question on which the decision of the highest court of the state is conclusive. The only question of which this court has jurisdiction is whether the tax was in violation of the clause of the

[1] Dissenting opinion of Mr. Justice Bradley omitted.

constitution of the United States granting to congress the power to regulate commerce among the several states. The plaintiff in error contends that its cars could be taxed only in the state of Illinois, in which it was incorporated, and had its principal place of business. No general principles of law are better settled or more fundamental than that the legislative power of every state extends to all property within its borders, and that only so far as the comity of that state allows can such property be affected by the law of any other state. The old rule, expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*,—the law of the place where the property is kept and used. Green v. Van Buskirk, 5 Wall. 307, and 7 Wall. 139; Hervey v. Locomotive Works, 93 U. S. 664; Harkness v. Russell, 118 U. S. 663, 679, 7 Sup. Ct. Rep. 51; Walworth v. Harris, 129 U. S. 355, 9 Sup. Ct. Rep. 340; Story, Confl. Laws, § 550; Whart. Confl. Laws, §§ 297–311. As observed by Mr. Justice Story, in his commentaries just cited: "Although movables are for many purposes to be deemed to have no *situs* except that of the domicile of the owner, yet, this being but a legal fiction, it yields whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined. A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there." For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed on its account at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the state which imposes the tax. Lane Co. v. Oregon, 7 Wall. 71, 77; Railroad Co. v. Pennsylvania, 15 Wall. 300, 323, 324, 328; Railroad Co. v. Peniston, 18 Wall. 5, 29; Tappan v. Bank, 19 Wall. 490, 499; State Railroad Tax Cases, 92 U. S. 575, 607, 608; Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. Rep. 1091; Coe v. Errol, 116 U. S. 517, 524, 6 Sup. Ct. Rep. 475; Marye v. Railroad Co., 127 U. S. 117, 123, 8 Sup. Ct. Rep. 1037. It is equally well settled that there is nothing in the constitution or laws of the United States which prevents a state from taxing personal property employed in interstate or foreign commerce like other personal property within its jurisdiction. Delaware Railroad Tax, 18 Wall. 206, 232; Telegraph Co. v. Texas, 105 U. S. 460, 464; Ferry Co. v. Pennsylvania, 114 U. S. 196, 206, 211, 5 Sup. Ct. Rep. 826; Telegraph Co. v. Attorney General, 125 U. S. 530, 549, 8 Sup. Ct. Rep. 961; Marye v. Railroad Co., 127 U. S. 117, 124, 8 Sup. Ct. Rep. 1037; Leloup v. Mobile, 127 U. S. 640, 649, 8 Sup. Ct. Rep. 1380. Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States at the domicile of their owners, in one state, are not subject to taxation in another state at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual *situs* within its jurisdiction, and therefore can be taxed only at their legal *situs*,—their home port, and the domicile of their owners. Hays v. Steam-Ship Co., 17 How. 596; St. Louis v. Ferry Co., 11 Wall. 423; Morgan v. Parham, 16 Wall. 471; Ferry Co. v. East St. Louis, 107 U. S. 365, 2 Sup. Ct. Rep. 257; Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. Rep. 826. Between ships and vessels, having their *situs* fixed by act of congress, and their course over navigable waters, and touching land only incidentally and temporarily, and cars or vehicles of any kind, having no *situs* so fixed, and traversing the land only, the distinction is obvious. As has been said by this court: "Commerce on land between the different states is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the state and federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial road-way. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that state interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land." Railroad Co. v. Maryland, 21 Wall. 456, 470.

In Ferry Co. v. Pennsylvania, on which the plaintiff in error much relies, the New Jersey corporation taxed by the state of Pennsylvania, under one of the statutes now in question, had no property in Pennsylvania except a lease of a wharf at which its steam-boats touched to land and receive passengers and freight carried across the Delaware river; and the difference in the facts of that case and of this and in the rules applicable was clearly indicated in the opinion of the court as follows: "It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is

subject to taxation, provided, always, it be within the jurisdiction of the state." 114 U. S. 206, 5 Sup. Ct. Rep. 829. "While it is conceded that the property in a state belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void as an interference with and an obstruction of the power of congress in the regulation of such commerce." 114 U. S. 211, 5 Sup. Ct. Rep. 832. Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one state cannot be taxed by another state for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself. Moran v. New Orleans, 112 U. S. 69, 74, 5 Sup. Ct. Rep. 38; Pickard v. Car Co., 117 U. S. 34, 43, 6 Sup. Ct. Rep. 635; Robbins v. Taxing Dist., 120 U. S. 489, 497, 7 Sup. Ct. Rep. 592; Leloup v. Mobile, 127 U. S. 640, 644, 8 Sup. Ct. Rep. 1380. For the same reason, a tax upon the gross receipts derived from the transportation of passengers and goods between one state and other states or foreign nations has been held to be invalid. Fargo v. Michigan, 121 U. S. 230, 7 Sup. Ct. Rep. 857; Steam-Ship Co. v. Pennsylvania, 122 U. S. 326, 7 Sup Ct. Rep. 1118.

The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; it is not a tax on or because of the transportation or the right of transit of persons or property through the state to other states or countries. The tax is imposed equally on corporations doing business within the state, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation on account of its property within the state is, in substance and effect, a tax on that property. Ferry Co. v. Pennsylvania, 114 U. S. 196, 209, 5 Sup. Ct. Rep. 826; Telegraph Co. v. Attorney General, 125 U. S. 530, 552, 8 Sup. Ct. Rep. 961. This is not only admitted, but insisted on, by the plaintiff in error.

The cars of this company within the state of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the state; and the state has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the state could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the state boundary, they cross that boundary in going out and coming back, cannot affect the power of the state to levy a tax upon them. The state, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the state, particular cars may not remain within the state; but the company has at all times substantially the same number of cars within the state, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about 100 cars within the state.

The mode which the state of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that state was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles in that and other states over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the states through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more. The validity of this mode of apportioning such a tax is sustained by several decisions of this court in cases which came up from the circuit courts of the United States, and in which, therefore, the jurisdiction of this court extended to the determination of the whole case, and was not limited, as upon writs of error to the state courts, to questions under the constitution and laws of the United States.

In the State Railroad Tax Cases, 92 U. S. 575, it was adjudged that a statute of Illinois, by which a tax on the entire taxable property of a railroad corporation, including its rolling stock, capital, and franchise, was assessed by the state board of equalization, and was collected in each municipality in proportion to the length of the road within it, was lawful, and not in conflict with the constitution of the state; and Mr. Justice MILLER, delivering judgment, said: "Another objection to the system of taxation by the state is that the rolling stock, capital stock, and franchise are personal property, and that this, with all other personal property, has a local *situs* at the principal place of business of the corporation, and can be taxed by no other county, city, or town but the one where it is so situated. This objection is based upon the general rule of law that personal property, as to its *situs*, follows the domicile of its owner. It may be doubted very reasonably whether such a rule can be applied to a railroad corporation as between the different localities embraced by its line of road. But, after

all, the rule is merely the law of the state which recognizes it; and when it is called into operation as to property located in one state and owned by a resident of another, it is a rule of comity in the former state rather than an absolute principle in all cases. Green v. Van Buskirk, 5 Wall. 312. Like all other laws of a state, it is therefore subject to legislative repeal, modification, or limitation; and when the legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation." 92 U. S. 607, 608. "It is further objected that the railroad track, capital stock, and franchise is not assessed in each county where it lies, according to its value there, but according to an aggregate value of the whole, on which each county, city, and town collects taxes according to the length of the track within its limits." "It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole." "This court has expressly held in two cases, where the road of a corporation ran through different states, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each state, as the basis of taxation. Delaware Railroad Tax, 18 Wall. 206; Railroad Co. v. Pennsylvania, 21 Wall. 492." 92 U. S. 608, 611. So in Telegraph Co. v. Attorney General, 125 U. S. 530, 8 Sup. Ct. Rep. 961, this court upheld the validity of a tax imposed by the state of Massachusetts upon the capital stock of a telegraph company, on account of property owned and used by it within the state, taking as the basis of assessment such proportion of the value of its capital stock as the length of its lines within the state bore to their entire length throughout the country.

Even more in point is the case of Marye v. Railroad Co., 127 U. S. 117, 8 Sup. Ct. Rep. 1037, in which the question was whether a railroad company incorporated by the state of Maryland, and no part of whose own railroad was within the state of Virginia, was taxable under general laws of Virginia upon rolling stock owned by the company and employed upon connecting railroads leased by it in that state, yet not assigned permanently to those roads, but used interchangeably upon them and upon roads in other states, as the company's necessities required. It was held not to be so taxable, solely because the tax laws of Virginia appeared upon their face to be limited to railroad corporations of that state; and Mr. Justice MATTHEWS, delivering the unanimous judgment of the court, said: "It is not denied, as it cannot be, that the state of Virginia has rightful power to levy and collect a tax upon such property used and found within its territorial limits as this property was used and found, if and whenever it may choose, by apt legislation, to exert its authority over the subject. It is quite true, as the *situs* of the Baltimore and Ohio Railroad Company is in the state of Maryland, that also, upon general principles, is the *situs* of all its personal property; but for purposes of taxation, as well as for other purposes, that *situs* may be fixed in whatever locality the property may be brought and used by its owner by the law of the place where it is found. If the Baltimore and Ohio Railroad Company is permitted by the state of Virginia to bring into its territory, and there habitually to use and employ, a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the state to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in the like way by its own citizens. And such a tax might be properly assessed and collected in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. Of course, the lawfulness of a tax upon vehicles of transportation used by common carriers might have to be considered in particular instances with reference to its operation as a regulation of commerce among the states, but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid." 127 U. S. 123, 124, 8 Sup. Ct. Rep. 1039, 1040. For these reasons, and upon these authorities, the court is of opinion that the tax in question is constitutional and valid. The result of holding otherwise would be that, if all the states should concur in abandoning the legal fiction that personal property has its *situs* at the owner's domicile, and in adopting the system of taxing it at the place at which it is used and by whose laws it is protected, property employed in any business requiring continuous and constant movement from one state to another would escape taxation altogether. Judgment affirmed.

BROWN, J., not having been a member of the court when this case was argued, took no part in its decision.

Mr. Justice BRADLEY, Mr. Justice FIELD, and Mr. Justice HARLAN dissenting.

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ROBBINS v. TAXING DISTRICT OF SHELBY CO., TENNESSEE.[1]

(7 Sup. Ct. 592, 120 U. S. 489.)

Supreme Court of the United States. March 7, 1887.

In error to the supreme court of the state of Tennessee.

Luke E. Wright (F. T. Edmondson was with him on the brief), for plaintiff in error. S. P. Walker, for defendant in error.

BRADLEY, J. This case originated in the following manner: Sabine Robbins, the plaintiff in error, in February, 1884, was engaged at the city of Memphis, in the state of Tennessee, in soliciting the sale of goods for the firm of Rose, Robbins & Co., of Cincinnati, in the state of Ohio, dealers in paper and other articles of stationery, and exhibited samples for the purpose of effecting such sales,—an employment usually denominated as that of a "drummer." There was in force at that time a statute of Tennessee, relating to the subject of taxation in the taxing districts of the state, applicable, however, only to the taxing districts of Shelby county, (formerly the city of Memphis,) by which it was enacted, amongst other things, that "all drummers, and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares, or merchandise therein, by sample, shall be required to pay to the county trustee the sum of ten dollars ($10) per week, or twenty-five dollars per month, for such privilege; and no license shall be issued for a longer period than three months." Act 1881, c. 96, § 16. The business of selling by sample, and nearly 60 other occupations, had been by law declared to be privileges, and were taxed as such; and it was made a misdemeanor, punishable by a fine of not less than five, nor more than fifty, dollars, to exercise any of such occupations without having first paid the tax, or obtained a license required therefor. Under this law, Robbins, who had not paid the tax nor taken a license, was prosecuted, convicted, and sentenced to pay a fine of $10, together with the state and county tax, and costs; and, on appeal to the supreme court of the state, the judgment was affirmed. This writ of error is brought to review the judgment of the supreme court, on the ground that the law imposing the tax was repugnant to that clause of the constitution of the United States which declares that congress shall have power to regulate commerce among the several states.

On the trial of the cause in the inferior court, a jury being waived, the following agreed statement of facts was submitted to the court, to wit: "Sabine Robbins is a citizen and resident of Cincinnati, Ohio, and on the ——— day of ———, 1884, was engaged in the business of drumming in the taxing district of Shelby county, Tennessee,—i. e., soliciting trade, by the use of samples, for the house or firm for which he worked as drummer; said firm being the firm of 'Rose, Robbins & Co.,' doing business in Cincinnati, and all the members of said firm being citizens and residents of Cincinnati, Ohio. While engaged in the act of drumming for said firm, and for the claimed offense of not having taken out the required license for doing said business, the defendant, Sabine Robbins, was arrested by one of the Memphis or taxing district police force and carried before the Hon. D. P. Hadden, president of the taxing district, and fined for the offense of drumming without a license. It is admitted the firm of 'Rose, Robbins & Co.' are engaged in the selling of paper, writing materials, and such articles as are used in the book-stores of the taxing district of Shelby county, and that it was a line of such articles for the sale of which the said defendant herein was drumming at the time of his arrest." This was all the evidence, and thereupon the court rendered judgment against the defendant, to which he excepted, and a bill of exceptions was taken.

The principal question argued before the supreme court of Tennessee was as to the constitutionality of the act which imposed the tax on drummers; and the court decided that it was constitutional and valid. That is the question before us, and it is one of great importance to the people of the United States, both as respects their business interests and their constitutional rights. It is presented in a nutshell, and does not, at this day, require for its solution any great elaboration of argument or review of authorities. Certain principles have been already established by the decisions of this court, which will conduct us to a satisfactory decision. Among those principles are the following:

1. The constitution of the United States having given to congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation. This was decided in the case of Cooley v. Board of Wardens of the Port of Philadelphia, 12 How. 299, 319, and was virtually involved in the case of Gibbons v. Ogden, 9 Wheat. 1, and has been confirmed in many subsequent cases; amongst others, in Brown v. Maryland, 12 Wheat. 419; Passenger Cases, 7 How. 283; Crandall v. Nevada, 6 Wall. 35, 42; Ward v. Maryland, 12 Wall. 418, 430; State Freight Tax Cases, 15 Wall. 232, 279; Henderson v. Mayor of New York, 92 U. S. 259, 272; Railroad Co. v. Husen, 95 U. S. 465, 469; Mobile v. Kimball, 102 U. S. 691, 697; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203, 5 Sup. Ct. 826; Wabash R. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4.

[1] Dissenting opinion of Mr. Chief Justice Waite is omitted.

2. Another established doctrine of this court is that, where the power of congress to regulate is exclusive, the failure of congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom. This was held by Mr. Justice Johnson in Gibbons v. Ogden, 9 Wheat. 1, 222; by Mr. Justice Grier in the Passenger Cases, 7 How. 283, 462; and has been affirmed in subsequent cases. State Freight Tax Cases, 15 Wall. 232, 279; Railroad Co. v. Husen, 95 U. S. 465, 469; Welton v. Missouri, 91 U. S. 275, 282; County of Mobile v. Kimball, 102 U. S. 691, 697; Brown v. Houston, 114 U. S. 622, 631, 5 Sup. Ct. 1091; Walling v. Michigan, 116 U. S. 446, 455, 6 Sup. Ct. 454; Pickard v. Pullman Palace Car Co., 117 U. S. 34, 6 Sup. Ct. 635; Wabash R. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4.

3. It is also an established principle, as already indicated, that the only way in which commerce between the states can be legitimately affected by state laws is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons and the protection of property, or when it does those things which may otherwise incidentally affect commerce; such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the state or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the constitution and laws of the United States, and the imposition of taxes upon all property within the state, mingled with and forming part of the great mass of property therein. But, in making such internal regulations, a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not yet become part of the common mass of property therein; and no discrimination can be made by any such regulations adversely to the persons or property of other states; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to congress over the subject. For authorities on this last head it is only necessary to refer to those already cited. In a word, it may be said that, in the matter of interstate commerce, the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by congress, is so firmly established that it is unnecessary to enlarge further upon the subject.

In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states for selling or seeking to sell their goods in such state before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer or a merchant of one state to sell his goods in another state, without, in some way, obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? This may, undoubtedly, be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or wooden-ware, may, perhaps, safely take his goods to the city of New York, and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands, of articles which no person would think of exporting to another state without first procuring an order for them. It is true, a merchant or manufacturer in one state may erect or hire a warehouse or store in another state, in which to place his goods, and await the chances of being able to sell them; but this would require a warehouse or store in every state with which he might desire to trade. Surely, he cannot be compelled to take this inconvenient and expensive course. In certain branches of business, it may be adopted with advantage. Many manufacturers do open houses or places of business in other states than those in which they reside, and send their goods there to be kept on sale; but this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kinds of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do, who wishes to sell his goods in other states? Must he sit still in his factory or warehouse, and wait for the people of those states to come to him? This would be a silly and ruinous proceeding. The only other way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons

residing or doing business in those other states. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such states for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce, is to speak at least unadvisedly, and without due attention to the truth of things. It may be suggested that the merchant or manufacturer has the post-office at his command, and may solicit orders through the mails. We do not suppose, however, that any one would seriously contend that this is the only way in which his business can be transacted without being amenable to exactions on the part of the state. Besides, why could not the state to which his letters might be sent, tax him for soliciting orders in this way, as well as in any other way? The truth is, that in numberless instances, the most feasible, if not the only practicable, way for the merchant or manufacturer to obtain orders in other states is to obtain them by personal application, either by himself or by some one employed by him for that purpose; and in many branches of business he must necessarily exhibit samples for the purpose of determining the kind and quality of the goods he proposes to sell, or which the other party desires to purchase. But the right of taxation, if it exists at all, is not confined to selling by sample. It embraces every act of sale, whether by word of mouth only, or by the exhibition of samples. If the right exists, any New York or Chicago merchant, visiting New Orleans or Jacksonville for pleasure or for his health, and casually taking an order for goods to be sent from his warehouse, could be made liable to pay a tax for so doing, or be convicted of a misdemeanor for not having taken out a license. The right to tax would apply equally as well to the principal as to his agent, and to a single act of sale as to a hundred acts.

But it will be said that a denial of this power of taxation will interfere with the right of the state to tax business pursuits and callings carried on within its limits, and its right to require licenses for carrying on those which are declared to be privileges. This may be true to a certain extent, but only in those cases in which the states themselves, as well as individual citizens, are subject to the restraints of the higher law of the constitution; and this interference will be very limited in its operation. It will only prevent the levy of a tax, or the requirements of a license, for making negotiations in the conduct of interstate commerce; and it may well be asked where the state gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even on that of postmaster or United States marshal. The mere calling the business of a drummer a privilege, cannot make it so. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce? It seems to be forgotten in argument that the people of this country are citizens of the United States, as well as of the individual states, and that they have some rights under the constitution and laws of the former, independent of the latter, and free from any interference or restraint from them. To deny to the state the power to lay the tax or require the license in question, will not, in any perceptible degree, diminish its resources, or its just power of taxation. It is very true that, if the goods when sold were in the state, and part of its general mass of property, they would be liable to taxation; but when brought into the state in consequence of the sale, they will be equally liable; so that, in the end, the state will derive just as much revenue from them as if they were there before the sale. As soon as the goods are in the state, and become part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held by this court in the case of Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091. When goods are sent from one state to another for sale, or in consequence of a sale, they become part of its general property, and amenable to its laws: provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way, as other goods are. Brown v. Houston, qua supra; Machine Co. v. Gage, 100 U. S. 676. But to tax the sale of such goods, or the offer to sell them, before they are brought into the state, is a very different thing, and seems to us clearly a tax on interstate commerce itself.

It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers,—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. This was decided in the State Freight Tax Cases, 15 Wall. 232. The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because, in the one case, it is an act of foreign, and, in the other, of interstate, commerce, both of which are subject to regulation by congress alone. It would not be difficult, however, to show that the tax authorized by the state of Tennessee in the present case is discriminative against the merchants and

manufacturers of other states. They can only sell their goods in Memphis by the employment of drummers and by means of samples; whilst the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents, and, if they had, they are not subject to any tax therefor. They are taxed for their licensed houses, it is true; but so, it is presumable, are the merchants and manufacturers of other states in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such was undoubtedly one of its objects. This kind of taxation is usually imposed at the instance and solicitation of domestic dealers as a means of protecting them from foreign competition; and in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a state can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the constitution, and which was one of the principal causes that led to it. If the selling of goods by sample, and the employment of drummers for that purpose, injuriously affect the local interest of the states, congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And congress alone can do it; for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant, or retaliatory enactments of 40 different states. The confusion into which the commerce of the country would be thrown by being subject to state legislation on this subject would be but a repetition of the disorder which prevailed under the articles of confederation.

To say that the tax, if invalid as against drummers from other states, operates as a discrimination against the drummers of Tennessee, against whom it is conceded to be valid, is no argument, because the state is not bound to tax its own drummers; and if it does so, whilst having no power to tax those of other states, it acts of its own free will, and is itself the author of such discriminations. As before said, the state may tax its own internal commerce; but that does not give it any right to tax interstate commerce.

The judgment of the supreme court of Tennessee is reversed, and the plaintiff in error must be discharged.

Mr. Chief Justice WAITE, Mr. Justice FIELD, and Mr. Justice GRAY, dissent.

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FONG YUE TING v. UNITED STATES et al. WONG QUAN v. SAME. LEE JOE v. SAME.[1]

(13 Sup. Ct. 1016, 149 U. S. 698.)

Supreme Court of the United States. May 15, 1893.

(Nos. 1,345, 1,346, 1,347.)

Appeals from the circuit court of the United States in and for the southern district of New York. Affirmed.

Statement by Mr. Justice GRAY:

These were three writs of habeas corpus, granted by the circuit court of the United States for the southern district of New York, upon petitions of Chinese laborers arrested and held by the marshal of the district for not having certificates of residence, under section 6 of the act of May 5, 1892, c. 60, which is copied in the margin.[2]

The rules and regulations made and promulgated by the secretary of the treasury under section 7 of that act prescribe forms for applications for certificates of residence, for affidavits in support thereof, and for the certificates themselves; contain the pro-

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[1] Dissenting opinions of Mr. Chief Justice Fuller, Mr. Justice Brewer, and Mr. Justice Field omitted.

[2] An act to prohibit the coming of Chinese persons into the United States.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that all laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this act.

Sec. 2. That any Chinese person or person of Chinese descent, when convicted and adjudged under any of said laws to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China, unless he or they shall make it appear to the justice, judge, or commissioner before whom he or they are tried that he or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country: provided, that in any case where such other country, of which such Chinese person shall claim to be a citizen or subject, shall demand any tax as a condition of the removal of such person to that country, he or she shall be removed to China.

Sec. 3. That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States, unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States.

Sec. 4. That any such Chinese person or person of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period of not exceeding one year, and thereafter removed from the United States, as hereinbefore provided.

Sec. 5. That after the passage of this act, on an application to any judge or court of the United States in the first instance for a writ of habeas corpus, by a Chinese person seeking to land in the United States, to whom that privilege has been denied, no bail shall be allowed, and such application shall be heard and determined promptly, without unnecessary delay.

Sec. 6. And it shall be the duty of all Chinese laborers within the limits of the United States at the time of the passage of this act, and who are entitled to remain in the United States, to apply to the collector of internal revenue of their respective districts, within one year after the passage of this act, for a certificate of residence; and any Chinese laborer within the limits of the United States, who shall neglect, fail, or refuse to comply with the provisions of this act, or who, after one year from the passage hereof, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested by any United States customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States, as hereinbefore provided, unless he shall establish clearly, to the satisfaction of said judge, that by reason of accident, sickness, or other unavoidable cause he has been unable to procure his certificate, and to the satisfaction of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act; and if upon the hearing it shall appear that he is so entitled to a certificate, it shall be granted, upon his paying the cost. Should it appear that said Chinaman had procured a certificate which has been lost or destroyed, he shall be detained, and judgment suspended a reasonable time to enable him to procure a duplicate from the officer granting it; and in such cases the cost of said arrest and trial shall be in the discretion of the court. And any Chinese person other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right, may apply for and receive the same without charge.

Sec. 7. That immediately after the passage of this act the secretary of the treasury shall make such rules and regulations as may be necessary for the efficient execution of this act, and shall prescribe the necessary forms and furnish the necessary blanks to enable collectors of internal revenue to issue the certificates required hereby, and make such provisions that certificates may be procured in localities convenient to the applicants. Such certificates shall be issued without charge to the applicant, and shall contain the name, age, local residence, and occupation of the applicant, and such other description of the applicant as shall be prescribed by the secretary of the treasury; and a duplicate thereof shall be filed in the office of the collector of internal revenue for the district within which such Chinaman makes application.

Sec. 8. That any person who shall knowingly and falsely alter or substitute any name for the name written in such certificate, or forge such certificate, or knowingly utter any forged or fraudulent certificate, or falsely personate any person named in such certificate, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding one thousand dollars, or imprisoned in the penitentiary for a term of not more than five years.

Sec. 9. The secretary of the treasury may authorize the payment of such compensation in the nature of fees to the collectors of internal revenue, for services performed under the provisions of this act, in addition to salaries now allowed by law, as he shall deem necessary, not exceeding the sum of one dollar for each certificate issued.

visions copied in the margin;[3] and also provide for recording duplicates of the certificates in the office of the collector of internal revenue.

The first petition alleged that the petitioner was a person of the Chinese race, born in China, and not a naturalized citizen of the United States; that in or before 1879 he came to the United States, with the intention of remaining and taking up his residence therein, and with no definite intention of returning to China, and had ever since been a permanent resident of the United States, and for more than a year last past had resided in the city, county, and state of New York, and within the second district for the collection of internal revenue in that state; that he had not, since the passage of the act of 1892, applied to the collector of internal revenue of that district for a certificate of residence, as required by section 6, and was, and always had been, without such certificate of residence; and that he was arrested by the marshal, claiming authority to do so under that section, without any writ or warrant. The return of the marshal stated that the petitioner was found by him within the jurisdiction of the United States and in the southern district of New York, without the certificate of residence required by that section; that he had, therefore, arrested him, with the purpose and intention of taking him before a United States judge within that district; and that the petitioner admitted to the marshal, in reply to questions put through an interpreter, that he was a Chinese laborer, and was without the required certificate of residence.

The second petition contained similar allegations, and further alleged that the petitioner was taken by the marshal before the district judge for the southern district of New York, and that "the said United States judge, without any hearing of any kind, thereupon ordered that your petitioner be remanded to the custody of the marshal in and for the southern district of New York, and deported forthwith from the United States, as is provided in said act of May 5, 1892, all of which more fully appears by said order, a copy of which is hereto annexed and made a part hereof," and which is copied in the margin;[4] and that he was detained by virtue of the marshal's claim of authority and the judge's order. The marshal returned that he held the petitioner under that order.

In the third case the petition alleged, and the judge's order showed, the following state of facts: On April 11, 1893, the petitioner applied to the collector of internal revenue for a certificate of residence. The collector refused to give him a certificate, on the ground that the witnesses whom he produced to prove that he was entitled to the certificate were persons of the Chinese race, and not credible witnesses, and required of him to produce a witness other than a Chinaman to prove that he was entitled to the certificate, which he was unable to do, because

[3] Collectors of internal revenue will receive applications on the following form, at their own offices, from such Chinese as are conveniently located thereto, and will cause their deputies to proceed to the towns or cities in their respective divisions where any considerable number of Chinese are residing, for the purpose of receiving applications. No application will be received later than May 5, 1893.

Collectors and deputies will give such notice, through leading Chinese, or by notices posted in the Chinese quarter of the various localities, as will be sufficient to apprise all Chinese residing in their districts of their readiness to receive applications, and the time and place where they may be made. All applications received by deputies must be forwarded to the collector's office, from whose office all certificates of residence will be issued, and sent to the deputy for delivery.

The affidavit of at least one credible witness of good character to the fact of residence and lawful status within the United States must be furnished with every application. If the applicant is unable to furnish such witness satisfactory to the collector or his deputy, his application will be rejected, unless he shall furnish other proof of his right to remain in the United States, in which case the application, with the proofs presented, shall be forwarded to the commissioner of internal revenue for his decision. The witness must appear before the collector or his deputy, and be fully questioned in regard to his testimony before being sworn.

In all cases of loss or destruction of original certificates of residence, where it can be established to the satisfaction of the collector of the district in which the certificate was issued that such loss or destruction was accidental, and without fault or negligence on the part of the applicant, a duplicate of the original may be issued under the same conditions that governed the original issue.

[4] In the matter of the arrest and deportation of Wong Quan, a Chinese laborer.

Wong Quan, a Chinese laborer, having been arrested in the city of New York on the 6th day of May, 1893, and brought before me, a United States judge, by John W. Jacobus, the marshal of the United States in and for the southern district of New York, as being a Chinese laborer found within the jurisdiction of the United States after the expiration of one year from the passage of the act of congress approved on the 5th day of May, 1892, and entitled "An act to prohibit the coming of Chinese persons into the United States," without having the certificate of residence required by said act; and the said Wong Quan having failed to clearly establish to my satisfaction that by reason of accident, sickness, or other unavoidable cause he had been unable to procure the said certificate, or that he had procured such certificate, and that the same had been lost or destroyed: Now, on motion of Edward Mitchell, the United States attorney in and for the southern district of New York, it is ordered that the said Wong Quan be, and he hereby is, remanded to the custody of the said John W. Jacobus, the United States marshal in and for the southern district of New York; and it is further ordered, that the said Wong Quan be deported from the United States of America in accordance with the provisions of said act of congress approved on the 5th day of May, 1892.

Dated New York, May 6, 1893.

Addison Brown,

United States District Judge for the Southern District of New York.

there was no person other than one of the Chinese race who knew and could truthfully swear that he was lawfully within the United States on May 5, 1892, and then entitled to remain therein; and because of such unavoidable cause he was unable to produce a certificate of residence, and was now without one. The petitioner was arrested by the marshal, and taken before the judge, and clearly established to the satisfaction of the judge that he was unable to procure a certificate of residence by reason of the unavoidable cause aforesaid; and also established to the judge's satisfaction, by the testimony of a Chinese resident of New York, that the petitioner was a resident of the United States at the time of the passage of the act; but, having failed to establish this fact clearly to the satisfaction of the court by at least one credible white witness, as required by the statute, the judge ordered the petitioner to be remanded to the custody of the marshal, and to be deported from the United States, as provided in the act.

Each petition alleged that the petitioner was arrested and detained without due process of law, and that section 6 of the act of May 5, 1892, was unconstitutional and void.

In each case the circuit court, after a hearing upon the writ of habeas corpus and the return of the marshal, dismissed the writ of habeas corpus, and allowed an appeal of the petitioner to this court, and admitted him to bail pending the appeal. All the proceedings, from the arrest to the appeal, took place on May 6th.

Jos. H. Choate, J. Hubley Ashton, and Maxwell Evarts, for appellants. Sol. Gen. Aldrich, for appellees.

Mr. Justice GRAY, after stating the facts, delivered the opinion of the court.

The general principles of public law which lie at the foundation of these cases are clearly established by previous judgments of this court, and by the authorities therein referred to.

In the recent case of Nishimura Ekiu v. U. S., 142 U. S. 651, 659, 12 Sup. Ct. Rep. 336, the court, in sustaining the action of the executive department, putting in force an act of congress for the exclusion of aliens, said: "It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government, to which the constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the president and senate or through statutes enacted by congress."

The same views were more fully expounded in the earlier case of Chae Chan Ping v. U. S., 130 U. S. 581, 9 Sup. Ct. Rep. 623, in which the validity of a former act of congress, excluding Chinese laborers from the United States, under the circumstances therein stated, was affirmed.

In the elaborate opinion delivered by Mr. Justice Field in behalf of the court it was said: "Those laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory, is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power." "The United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory." 130 U. S. 603, 604, 9 Sup. Ct. Rep. 629.

It was also said, repeating the language of Mr. Justice Bradley in Knox v. Lee, 12 Wall. 457, 555: "The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the state governments." 130 U. S. 605, 9 Sup. Ct. Rep. 629. And it was added: "For local interests, the several states of the Union exist; but for international purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." 130 U. S. 606, 9 Sup. Ct. Rep. 630.

The court then went on to say: "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation; and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, is necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of

foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action, it can make complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interests or dignity may demand; and there lies its only remedy. The power of the government to exclude foreigners from the country, whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments." 130 U. S. 606, 607, 9 Sup. Ct. Rep. 631. This statement was supported by many citations from the diplomatic correspondence of successive secretaries of state, collected in Whart. Int. Law Dig. § 206.

The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.

This is clearly affirmed in dispatches referred to by the court in Chae Chan Ping's Case. In 1856, Mr. Marcy wrote: "Every society possesses the undoubted right to determine who shall compose its members, and it is exercised by all nations, both in peace and war. A memorable example of the exercise of this power in time of peace was the passage of the alien law of the United States in the year 1798." In 1869, Mr. Fish wrote: "The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the state, are too clearly within the essential attributes of sovereignty to be seriously contested." Whart. Int. Law Dig. § 206; 130 U. S. 607, 9 Sup. Ct. Rep. 630.

The statements of leading commentators on the law of nations are to the same effect.

Vattel says: "Every nation has the right to refuse to admit a foreigner into the country, when he cannot enter without putting the nation in evident danger, or doing it a manifest injury. What it owes to itself, the care of its own safety, gives it this right; and, in virtue of its natural liberty, it belongs to the nation to judge whether its circumstances will or will not justify the admission of the foreigner." "Thus, also, it has a right to send them elsewhere, if it has just cause to fear that they will corrupt the manners of the citizens; that they will create religious disturbances, or occasion any other disorder, contrary to the public safety. In a word, it has a right, and is even obliged, in this respect, to follow the rules which prudence dictates." Vatt. Law Nat. lib. 1, c. 19, §§ 230, 231.

Ortolan says: "The government of each state has always the right to compel foreigners who are found within its territory to go away, by having them taken to the frontier. This right is based on the fact that, the foreigner not making part of the nation, his individual reception into the territory is matter of pure permission, of simple tolerance, and creates no obligation. The exercise of this right may be subjected, doubtless, to certain forms by the domestic laws of each country; but the right exists none the less, universally recognized and put in force. In France no special form is now prescribed in this matter; the exercise of this right of expulsion is wholly left to the executive power." Ortolan, Diplomatie de la Mer, (4th Ed.) lib. 2, c. 14, p. 297.

Phillimore says: "It is a received maxim of international law that the government of a state may prohibit the entrance of strangers into the country, and may, therefore, regulate the conditions under which they shall be allowed to remain in it, or may require and compel their departure from it." 1 Phillim. Int. Law, (3d Ed.) c. 10, § 220.

Bar says: "Banishment and extradition must not be confounded. The former is simply a question of expediency and humanity, since no state is bound to receive all foreigners, although, perhaps, to exclude all would be to say good-bye to the international union of all civilized states; and although in some states, such as England, strangers can only be expelled by means of special acts of the legislative power, no state has renounced its right to expel them, as is shown by the alien bills which the government of England has at times used to invest itself with the right of expulsion." "Banishment is regulated by rules of expediency and humanity, and is a matter for the police of the state. No doubt the police can apprehend any foreigner who refuses to quit the country in spite of authoritative orders to do so, and convey him to the frontier." Bar, Int. Law, (Gillespie's Ed. 1883,) 708, note, 711.

In the passages just quoted from Gillespie's translation of Bar, "banishment" is evidently used in the sense of expulsion or deportation by the political authority on the ground of expediency, and not in the sense of transportation or exile by way of punishment for crime. Strictly speaking, "transportation," "extradition," and "deportation," although each has the effect of removing a person from the country, are different things, and have different purposes. "Transportation"

is by way of punishment of one convicted of an offense against the laws of the country. "Extradition" is the surrender to another country of one accused of an offense against its laws, there to be tried, and, if found guilty, punished. "Deportation" is the removal of an alien out of the country simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent or under those of the country to which he is taken.

In England, the only question that has ever been made in regard to the power to expel aliens has been whether it could be exercised by the king without the consent of parliament. It was formerly exercised by the king, but in later times by parliament, which passed several acts on the subject between 1793 and 1848. 2 Inst. 57; 1 Chalm. Op. 26; 1 Bl. Comm. 260; Chit. Prerog. 49; 1 Phillim. Int. Law, c. 10, § 220, and note; 30 Parl. Hist. 157, 167, 188, 217, 229; 34 Hans. Deb. (1st Series) 441, 445, 471, 1065–1071; 6 Law Rev. Quar. 27.

Eminent English judges, sitting in the judicial committee of the privy council, have gone very far in supporting the exclusion or expulsion, by the executive authority of a colony, of aliens having no absolute right to enter its territory or to remain therein.

In 1837, in a case arising in the island of Mauritius, which had been conquered by Great Britain from France in 1810, and in which the law of France continued in force, Lord Lyndhurst, Lord Brougham, and Justices Bosanquet and Erskine, although considering it a case of great hardship, sustained the validity of an order of the English governor, deporting a friendly alien, who had long resided and carried on business in the island, and had enjoyed the privileges and exercised the rights of a person duly domiciled, but who had not, as required by the French law, obtained from the colonial government formal and express authority to establish a domicile there. In re Adam, 1 Moore, P. C. (N. S.) 460.

In a recent appeal from a judgment of the supreme court of the colony of Victoria, a collector of customs, sued by a Chinese immigrant for preventing him from landing in the colony, had pleaded a justification under the order of a colonial minister claiming to exercise an alleged prerogative of the crown to exclude alien friends, and denied the right of a court of law to examine his action, on the ground that what he had done was an act of state; and the plaintiff had demurred to the plea. Lord Chancellor Halsbury, speaking for himself, for Lord Herschell, (now lord chancellor,) and for other lords, after deciding against the plaintiff on a question of statutory construction, took occasion to observe: "The facts appearing on the record raise, quite apart from the statutes referred to, a grave question as to the plaintiff's right to maintain the action. He can only do so if he can establish that an alien has a legal right, enforceable by action, to enter British territory. No authority exists for the proposition that an alien has any such right. Circumstances may occur in which the refusal to permit an alien to land might be such an interference with international comity as would properly give rise to diplomatic remonstrance from the country of which he was a native; but it is quite another thing to assert that an alien, excluded from any part of her majesty's dominions by the executive government there, can maintain an action in a British court, and raise such questions as were argued before their lordships on the present appeal,—whether the proper officer for giving or refusing access to the country has been duly authorized by his own colonial government, whether the colonial government has received sufficient delegated authority from the crown to exercise the authority which the crown had a right to exercise through the colonial government if properly communicated to it, and whether the crown has the right, without parliamentary authority, to exclude an alien. Their lordships cannot assent to the proposition that an alien refused permission to enter British territory can, in an action in a British court, compel the decision of such matters as these, involving delicate and difficult constitutional questions affecting the respective rights of the crown and parliament, and the relations of this country to her self-governing colonies. When once it is admitted that there is no absolute and unqualified right of action on behalf of an alien refused admission to British territory, their lordships are of opinion that it would be impossible, upon the facts which the demurrer admits, for an alien to maintain an action." Musgrove v. Chun Teeong Toy, [1891] App. Cas. 272, 282, 283.

The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare, the question now before the court is whether the manner in which congress has exercised this right in sections 6 and 7 of the act of 1892 is consistent with the constitution.

The United States are a sovereign and independent nation, and are vested by the constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control, and to make it effective. The only government of this country which other nations recognize or treat with is the government of the Union, and the only American flag known throughout the world is the flag of the United States.

The constitution of the United States speaks with no uncertain sound upon this subject. That instrument, established by

the people of the United States as the fundamental law of the land, has conferred upon the president the executive power; has made him the commander in chief of the army and navy; has authorized him, by and with the consent of the senate, to make treaties, and to appoint ambassadors, public ministers, and consuls; and has made it his duty to take care that the laws be faithfully executed. The constitution has granted to congress the power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces; and to make all laws necessary and proper for carrying into execution these powers, and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof. And the several states are expressly forbidden to enter into any treaty, alliance, or confederation; to grant letters of marque and reprisal; to enter into any agreement or compact with another state, or with a foreign power; or to engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

In exercising the great power which the people of the United States, by establishing a written constitution as the supreme and paramount law, have vested in this court, of determining, whenever the question is properly brought before it, whether the acts of the legislature or of the executive are consistent with the constitution, it behooves the court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the constitution to the other departments of the government.

As long ago said by Chief Justice Marshall, and since constantly maintained by this court: "The sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution; and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." "Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power." McCulloch v. Maryland, 4 Wheat. 316, 421, 423; Juilliard v Greenman, 110 U. S. 421, 440, 450, 4 Sup. Ct. Rep. 122; Ex parte Yarbrough, 110 U. S. 651, 658, 4 Sup. Ct. Rep. 152; In re Rapier, 143 U. S. 110, 134, 12 Sup. Ct. Rep. 374; Logan v. U. S., 144 U. S. 263, 283, 12 Sup. Ct. Rep. 617.

The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the constitution, to intervene.

In Nishimura Ekiu's Case, it was adjudged that, although congress might, if it saw fit, authorize the courts to investigate and ascertain the facts upon which the alien's right to land was made by the statutes to depend, yet congress might intrust the final determination of those facts to an executive officer; and that, if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency. 142 U. S. 660, 12 Sup. Ct. Rep. 336.

The power to exclude aliens, and the power to expel them, rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.

The power of congress, therefore, to expel, like the power to exclude, aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by congress to depend.

Congress, having the right, as it may see fit, to expel aliens of a particular class, or to permit them to remain, has undoubtedly the right to provide a system of registration and identification of the members of that class within the country, and to take all proper means to carry out the system which it provides.

It is no new thing for the lawmaking power, acting either through treaties made by the president and senate, or by the more common method of acts of congress, to submit the decision of questions, not necessarily of judicial cognizance, either to the final determination of executive officers, or to the decision of such officers in the first instance,

with such opportunity for judicial review of their action as congress may see fit to authorize or permit.

For instance, the surrender, pursuant to treaty stipulations, of persons residing or found in this country, and charged with crime in another, may be made by the executive authority of the president alone, when no provision has been made by treaty or by statute for an examination of the case by a judge or magistrate. Such was the case of Jonathan Robbins, under article 27 of the treaty with Great Britain of 1794, in which the president's power in this regard was demonstrated in the masterly and conclusive argument of John Marshall in the house of representatives. 8 Stat. 129; Whart. State Tr. 392; U. S. v. Nash, Bee, 286, 5 Wheat. append. 3. But provision may be made, as it has been by later acts of congress, for a preliminary examination before a judge or commissioner; and in such case the sufficiency of the evidence on which he acts cannot be reviewed by any other tribunal, except as permitted by statute. Act Aug. 12, 1848, c. 167, (9 Stat. 302;) Rev. St. §§ 5270–5274; Ex parte Metzger, 5 How. 176; Benson v. McMahon, 127 U. S. 457, 8 Sup. Ct. Rep. 1240; In re Luis Oteiza y Cortes, 136 U. S. 330, 10 Sup. Ct. Rep. 1031.

So claims to recover back duties illegally exacted on imports may, if congress so provides, be finally determined by the secretary of the treasury. Cary v. Curtis, 3 How. 236; Curtis v. Fiedler, 2 Black, 461, 478, 479; Arnson v. Murphy, 109 U. S. 238, 240, 3 Sup. Ct. Rep. 184. But congress may, as it did for long periods, permit them to be tried by suit against the collector of customs; or it may, as by the existing statutes, provide for their determination by a board of general appraisers, and allow the decisions of that board to be reviewed by the courts in such particulars only as may be prescribed by law. Act June 10, 1890, c. 407, §§ 14, 15, 25, (26 Stat. 137, 138, 141;) In re Fassett, 142 U. S. 479, 486, 487, 12 Sup. Ct. Rep. 295; Passavant v. U. S., 148 U. S. 214, 13 Sup. Ct. Rep. 572.

To repeat the careful and weighty words uttered by Mr. Justice Curtis in delivering a unanimous judgment of this court upon the question what is due process of law: "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law or in equity or admiralty, nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." Murray v. Hoboken, etc., Co., 18 How. 272, 284.

Before examining in detail the provisions of the act of 1892, now in question, it will be convenient to refer to the previous statutes, treaties, and decisions upon the subject.

The act of congress of July 27, 1868, c. 249, (re-enacted in sections 1999–2001, Rev. St.,) began with these recitals: "Whereas, the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas, in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship." It then declared that any order or decision of any officer of the United States to the contrary was inconsistent with the fundamental principles of this government; enacted that "all naturalized citizens of the United States, while in foreign states, shall be entitled to and shall receive from this government the same protection of persons and property that is accorded to native-born citizens in like situations and circumstances;" and made it the duty of the president to take measures to protect the rights in that respect of "any citizen of the United States." 15 Stat. 223, 224.

That act, like any other, is subject to alteration by congress whenever the public welfare requires it. The right of protection which it confers is limited to citizens of the United States. Chinese persons, not born in this country, have never been recognized as citizens of the United States, nor authorized to become such under the naturalization laws. Rev. St. (2d Ed.) §§ 2165, 2169; Acts April 14, 1802, c. 28, (2 Stat. 153;) May 26, 1824, c. 186, (4 Stat. 69;) July 14, 1870, c. 254, § 7, (16 Stat. 256;) Feb. 18, 1875, c. 80, (18 Stat. 318;) In re Ah Yup, 5 Sawy. 155;[5] Act of May 6, 1882, c. 126, § 14, (22 Stat. 61.)

The treaty made between the United States and China on July 28, 1868, contained the following stipulations:

"Art. 5. The United States of America and the emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from one country to the other, for purposes of curiosity, of trade, or as permanent residents.

"Art. 6. Citizens of the United States visiting or residing in China, * * * and, reciprocally, Chinese subjects visiting or residing in the United States, shall enjoy the same privi-

[5] Fed. Cas. No. 104.

leges, immunities, and exemptions, in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States." 16 Stat. 740.

After some years' experience under that treaty, the government of the United States was brought to the opinion that the presence within our territory of large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests, and therefore requested and obtained from China a modification of the treaty. Chew Heong v. U. S., 112 U. S. 536, 542, 543, 5 Sup. Ct. Rep. 255; Chae Chan Ping v. U. S., 130 U. S. 581, 595, 596, 9 Sup. Ct. Rep. 623.

On November 17, 1880, a supplemental treaty was accordingly concluded between the two countries, which contained the following preamble and stipulations:

"Whereas, the government of the United States, because of the constantly increasing immigration of Chinese laborers to the territory of the United States, and the embarrassments consequent upon such immigration, now desires to negotiate a modification of the existing treaties which shall not be in direct contravention of their spirit:

"Article 1. Whenever, in the opinion of the government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country, or of any locality within the territory thereof, the government of China agrees that the government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.

"Art. 2. Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.

"Art. 3. If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the government of the United States will exert all its power to devise measures for their protection, and to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty." 22 Stat. 826, 827.

The act of May 6, 1882, c. 126, entitled "An act to execute certain treaty stipulations relating to Chinese," and amended by the act of July 5, 1884, c. 220, began with the recital that, "in the opinion of the government of the United States, the coming of Chinese laborers to this country endangers the good order of certain localities within the territories thereof;" and, in section 1, suspended their coming for 10 years, and enacted that it should "not be lawful for any Chinese laborer to come from any foreign port or place, or, having so come, to remain within the United States;" in section 3, that this provision should not apply to Chinese laborers who were in the United States on November 17, 1880, or who came here within 90 days after the passage of the act of 1882, and who should produce evidence of that fact, as afterwards required by the act, to the master of the vessel and to the collector of the port; and, in section 4, that "for the purpose of properly identifying Chinese laborers who were in the United States" at such time, "and in order to furnish them with the proper evidence of their right to go from and come to the United States," as provided by that act and by the treaty of November 17, 1880, the collector of customs of the district from which any Chinese laborers should depart from the United States by sea should go on board the vessel, and make and register a list of them, with all facts necessary for their identification, and should give to each a corresponding certificate, which should entitle him "to return to and re-enter the United States, upon producing and delivering the same to the collector of customs" to be canceled. The form of certificate prescribed by the act of 1884 differed in some particulars from that prescribed by the act of 1882, and the act of 1884 added that "said certificate shall be the only evidence to establish his right of re-entry." Each act further enacted, in section 5, that any such Chinese laborer, being in the United States, and desiring to depart by land, should be entitled to a like certificate of identity; and, in section 12, that no Chinese person should be permitted to enter the United States by land without producing such a certificate, and that "any Chinese person found unlawfully within the United States shall be caused to be removed

therefrom to the country from whence he came, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States, and found to be one not lawfully entitled to be or remain in the United States." The act of 1884 further enacted, in section 16, that a violation of any of the provisions of the act, the punishment of which was not therein otherwise provided for, should be deemed a misdemeanor, and be punishable by fine not exceeding $1,000, or by imprisonment for not more than one year, or by both such fine and imprisonment. 22 Stat. 58–60; 23 Stat. 115–118.

Under those acts this court held, in Chew Heong v. U. S., 112 U. S. 536, 5 Sup. Ct. Rep. 255, that the clause of section 4 of the act of 1884, making the certificate of identity the only evidence to establish a right to re-enter the United States, was not applicable to a Chinese laborer who resided in the United States at the date of the treaty of 1880, departed by sea before the passage of the act of 1882, remained out of the United States until after the passage of the act of 1884, and then returned by sea; and in U. S. v. Jung Ah Lung, 124 U. S. 621, 8 Sup. Ct. Rep. 663, that a Chinese laborer, who resided in the United States at the date of the treaty of 1880, and until 1883, when he left San Francisco for China, taking with him a certificate of identity from the collector of the port in the form provided by the act of 1882, which was stolen from him in China, was entitled to land again in the United States in 1885, on proving by other evidence these facts, and his identity with the person described in the register kept by the collector of customs as the one to whom that certificate was issued.

Both those decisions proceeded upon a consideration of the various provisions of the acts of 1882 and 1884, giving weight to the presumption that they should not, unless unavoidably, be construed as operating retrospectively, or as contravening the stipulations of the treaty. In the first of those cases Justices Field and Bradley, and in the second case Justices Field, Harlan, and Lamar, dissented from the judgment, being of opinion that the necessary construction of those acts was against the Chinese laborer; and in none of the opinions in either case was it suggested that the acts in question, if construed as contended by the United States, and so as to contravene the treaty, would be unconstitutional or inoperative.

In our jurisprudence it is well settled that the provisions of an act of congress, passed in the exercise of its constitutional authority, on this, as on any other, subject, if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty. As was said by this court in Chae Chan Ping's Case, following previous decisions: "The treaties were of no greater legal obligation than the act of congress. By the constitution, laws made in pursuance thereof, and treaties made under authority of the United States, are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of congress. In either case the last expression of the sovereign will must control." "So far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country it is subject to such acts as congress may pass for its enforcement, modification, or repeal." 130 U. S. 600, 9 Sup. Ct. Rep. 623. See, also, Foster v. Neilson, 2 Pet. 253, 314; Edye v. Robertson, 112 U. S. 580, 597–599, 5 Sup. Ct. Rep. 247; Whitney v. Robertson, 124 U. S. 190, 8 Sup. Ct. Rep. 456.

By the supplementary act of October 1, 1888, c. 1064, it was enacted, in section 1, that "from and after the passage of this act it shall be unlawful for any Chinese laborer, who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed or shall depart therefrom, and shall not have returned before the passage of this act, to return to, or remain in, the United States;" and, in section 2, that "no certificates of identity, provided for in the fourth and fifth sections of the act to which this is a supplement, shall hereafter be issued; and every certificate heretofore issued in pursuance thereof is hereby declared void and of no effect, and the Chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States." 25 Stat. 504.

In the case of Chae Chan Ping, already often referred to, a Chinese laborer, who had resided in San Francisco from 1875 until June 2, 1887, when he left that port for China, having in his possession a certificate issued to him on that day by the collector of customs, according to the act of 1884, and in terms entitling him to return to the United States, returned to the same port on October 8, 1888, and was refused by the collector permission to land, because of the provisions of the act of October 1, 1888, above cited. It was strongly contended in his behalf that by his residence in the United States for 12 years preceding June 2, 1887, in accordance with the fifth article of the treaty of 1868, he had now a lawful right to be in the United States, and had a vested right to return to the United States, which could

not be taken from him by any exercise of mere legislative power by congress; that he had acquired such a right by contract between him and the United States, by virtue of his acceptance of the offer contained in the acts of 1882 and 1884, to every Chinese person then here, if he should leave the country, complying with specified conditions, to permit him to return; that, as applied to him, the act of 1888 was unconstitutional, as being a bill of attainder and an ex post facto law; and that the depriving him of his right to return was punishment, which could not be inflicted except by judicial sentence. The contention was thus summed up at the beginning of the opinion: "The validity of the act is assailed as being in effect an expulsion from the country of Chinese laborers, in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of congress." 130 U. S. 584–589, 9 Sup. Ct. Rep. 624.

Yet the court unanimously held that the statute of 1888 was constitutional, and that the action of the collector in refusing him permission to land was lawful; and, after the passages already quoted, said: "The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract. Whatever license, therefore, Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure." "The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition; not such as are personal and untransferable in their character." "But far different is this case, where a continued suspension of the exercise of a governmental power is insisted upon as a right, because, by the favor and consent of the government, it has not heretofore been exerted with respect to the appellant, or to the class to which he belongs. Between property rights not affected by the termination or abrogation of a treaty, and expectations of benefits from the continuance of existing legislation, there is as wide a difference as between realization and hopes." 130 U. S. 609, 610, 9 Sup. Ct. Rep. 631.

It thus appears that in that case it was directly adjudged, upon full argument and consideration, that a Chinese laborer, who had been admitted into the United States while the treaty of 1868 was in force, by which the United States and China "cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from one country to the other," not only for the purpose of curiosity or of trade, but "as permanent residents," and who had continued to reside here for 12 years, and who had then gone back to China, after receiving a certificate, in the form provided by act of congress, entitling him to return to the United States, might be refused readmission into the United States, without judicial trial or hearing, and simply by reason of another act of congress, passed during his absence, and declaring all such certificates to be void, and prohibiting all Chinese laborers who had at any time been residents in the United States, and had departed therefrom and not returned before the passage of this act, from coming into the United States.

In view of that decision, which, as before observed, was a unanimous judgment of the court, and which had the concurrence of all the justices who had delivered opinions in the cases arising under the acts of 1882 and 1884, it appears to be impossible to hold that a Chinese laborer acquired, under any of the treaties or acts of congress, any right, as a denizen, or otherwise, to be and remain in this country, except by the license, permission, and sufferance of congress, to be withdrawn, whenever, in its opinion, the public welfare might require it.

By the law of nations, doubtless, aliens residing in a country, with the intention of making it a permanent place of abode, acquire, in one sense, a domicile there; and, while they are permitted by the nation to retain such a residence and domicile, are subject to its laws, and may invoke its protection against other nations. This is recognized by those publicists who, as has been seen, maintain in the strongest terms the right of the nation to expel any or all aliens at its pleasure. Vatt. Law Nat. lib. 1, c. 19, § 213; 1 Phillim. Int. Law, c. 18, § 321; Mr. Marcy, in Koszta's Case, 2 Whart. Int. Law Dig. § 198. See, also, Lau Ow Bew v. U. S., 144 U. S. 47, 62, 12 Sup. Ct. Rep. 517; Merl. Repert. "Domicile," § 13, quoted in the case above cited, of In re Adam, 1 Moore, P. C. (N. S.) 460, 472, 473.

Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the constitution, and to

the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility. But they continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of congress to expel them, or to order them to be removed and deported from the country, whenever, in its judgment, their removal is necessary or expedient for the public interest.

Nothing inconsistent with these views was decided or suggested by the court in Chy Lung v. Freeman, 92 U. S. 275, or in Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, cited for the appellants.

In Chy Lung v. Freeman, a statute of the state of California, restricting the immigration of Chinese persons, was held to be unconstitutional and void, because it contravened the grant in the constitutional congress of the power to regulate commerce with foreign nations.

In Yick Wo v. Hopkins the point decided was that the fourteenth amendment of the constitution of the United States, forbidding any state to deprive any person of life, liberty, or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, was violated by a municipal ordinance of San Francisco, which conferred upon the board of supervisors arbitrary power, without regard to competency of persons or to fitness of places, to grant or refuse licenses to carry on public laundries, and which was executed by the supervisors by refusing licenses to all Chinese residents, and granting them to other persons under like circumstances. The question there was of the power of a state over aliens continuing to reside within its jurisdiction, not of the power of the United States to put an end to their residence in the country.

The act of May 5, 1892, c. 60, is entitled "An act to prohibit the coming of Chinese persons into the United States;" and provides, in section 1, that "all laws now in force, prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent, are hereby continued in force for a period of ten years from the passage of this act."

The rest of the act (laying aside, as immaterial, section 5, relating to an application for a writ of habeas corpus "by a Chinese person seeking to land in the United States, to whom that privilege has been denied") deals with two classes of Chinese persons: First, those "not entitled to be or remain in the United States;" and, second, those "entitled to remain in the United States." These words of description neither confer nor take away any right, but simply designate the Chinese persons who were not, or who were, authorized or permitted to remain in the United States under the laws and treaties existing at the time of the passage of this act, but subject, nevertheless, to the power of the United States, absolutely or conditionally, to withdraw the permission, and to terminate the authority to remain.

Sections 2–4 concern Chinese "not lawfully entitled to be or remain in the United States," and provide that, after trial before a justice, judge, or commissioner, a "Chinese person, or person of Chinese descent, convicted and adjudged to be not lawfully entitled to be or remain in the United States," shall be imprisoned at hard labor for not more than a year, and be afterwards removed to China, or other country of which he appears to be a citizen or subject.

The subsequent sections relate to Chinese laborers "entitled to remain in the United States" under previous laws. Sections 6 and 7 are the only sections which have any bearing on the cases before us, and the only ones, therefore, the construction or effect of which need now be considered.

The manifest objects of these sections are to provide a system of registration and identification of such Chinese laborers, to require them to obtain certificates of residence, and, if they do not do so within a year, to have them deported from the United States.

Section 6, in the first place, provides that "it shall be the duty of all Chinese laborers, within the limits of the United States at the time of the passage of this act, and who are entitled to remain in the United States, to apply to the collector of internal revenue of their respective districts, within one year after the passage of this act, for a certificate of residence." This provision, by making it the duty of the Chinese laborer to apply to the collector of internal revenue of the district for a certificate, necessarily implies a correlative duty of the collector to grant him a certificate, upon due proof of the requisite facts. What this proof shall be is not defined in the statute, but is committed to the supervision of the secretary of the treasury by section 7, which directs him to make such rules and regulations as may be necessary for the efficient execution of the act, to prescribe the necessary forms, and to make such provisions that certificates may be procured in localities convenient to the applicants, and without charge to them; and the secretary of the treasury has, by such rules and regulations, provided that the fact of residence shall be proved by "at least one credible witness of good character," or, in case of necessity, by other proof. The statute and the regulations, in order to make sure that every such Chinese laborer may have a certificate, in the nature of a passport, with which he may go into any part of the United States, and that the United States may preserve a record of all such certificates issued, direct that a duplicate of each certificate shall be recorded in the office of the collector who granted it, and may be issued to the laborer upon proof of loss or destruction of his original certifi-

cate. There can be no doubt of the validity of these provisions and regulations, unless they are invalidated by the other provisions of section 6.

This section proceeds to enact that any Chinese laborer within the limits of the United States, who shall neglect, fail, or refuse to apply for a certificate of residence within the year, or who shall afterwards be found within the jurisdiction of the United States without such a certificate, "shall be deemed and adjudged to be unlawfully within the United States." The meaning of this clause, as shown by those which follow, is not that this fact shall thereupon be held to be conclusively established against him, but only that the want of a certificate shall be prima facie evidence that he is not entitled to remain in the United States; for the section goes on to direct that he "may be arrested by any customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge;" and that it shall thereupon be the duty of the judge to order that the laborer "be deported from the United States" to China, (or to any other country which he is a citizen or subject of, and which does not demand any tax as a condition of his removal to it,) "unless he shall establish clearly, to the satisfaction of said judge, that by reason of accident, sickness, or other unavoidable cause he has been unable to procure his certificate, and to the satisfaction of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act; and if, upon the hearing, it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost. Should it appear that said Chinaman had procured a certificate which has been lost or destroyed, he shall be detained, and judgment suspended a reasonable time, to enable him to procure a duplicate from the officer granting it; and in such cases the cost of said arrest and trial shall be in the discretion of the court."

For the reasons stated in the earlier part of this opinion, congress, under the power to exclude or expel aliens, might have directed any Chinese laborer found in the United States without a certificate of residence to be removed out of the country by executive officers, without judicial trial or examination, just as it might have authorized such officers absolutely to prevent his entrance into the country. But congress has not undertaken to do this.

The effect of the provisions of section 6 of the act of 1892 is that, if a Chinese laborer, after the opportunity afforded him to obtain a certificate of residence within a year, at a convenient place, and without cost, is found without such a certificate, he shall be so far presumed to be not entitled to remain within the United States that an officer of the customs, or a collector of internal revenue, or a marshal, or a deputy of either, may arrest him, not with a view to imprisonment or punishment, or to his immediate deportation without further inquiry, but in order to take him before a judge, for the purpose of a judicial hearing and determination of the only facts which, under the act of congress, can have a material bearing upon the question whether he shall be sent out of the country, or be permitted to remain.

The powers and duties of the executive officers named being ordinarily limited to their own districts, the reasonable inference is that they must take him before a judge within the same judicial district; and such was the course pursued in the cases before us.

The designation of the judge, in general terms, as "a United States judge," is an apt and sufficient description of a judge of a court of the United States, and is equivalent to or synonymous with the designation, in other statutes, of the judges authorized to issue writs of habeas corpus, or warrants to arrest persons accused of crime. Rev. St. §§ 752, 1014.

When, in the form prescribed by law, the executive officer, acting in behalf of the United States, brings the Chinese laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power; for here are all the elements of a civil case,—a complainant, a defendant, and a judge,—actor, reus, et judex. 3 Bl. Comm. 25; Osborn v. Bank, 9 Wheat. 738, 819. No formal complaint or pleadings are required, and the want of them does not affect the authority of the judge or the validity of the statute.

If no evidence is offered by the Chinaman, the judge makes the order of deportation as upon a default. If he produces competent evidence to explain the fact of his not having a certificate, it must be considered by the judge; and if he thereupon appears to be entitled to a certificate, it is to be granted to him. If he proves that the collector of internal revenue has unlawfully refused to give him a certificate, he proves an "unavoidable cause," within the meaning of the act, for not procuring one. If he proves that he had procured a certificate, which has been lost or destroyed, he is to be allowed a reasonable time to procure a duplicate thereof.

The provision which puts the burden of proof upon him of rebutting the presumption arising from his having no certificate, as well as the requirement of proof "by at least one credible white witness that he was a resident of the United States at the time of the passage of this act," is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government. Ogden v. Saunders, 12 Wheat. 213, 262, 349; Pillow v.

Roberts, 13 How. 472, 476; Cliquot's Champagne, 3 Wall. 114, 143; Ex parte Fisk, 113 U. S. 713, 721, 5 Sup. Ct. Rep. 724; Holmes v. Hunt, 122 Mass. 505, 516–519. The competency of all witnesses, without regard to their color, to testify in the courts of the United States, rests on acts of congress, which congress may, at its discretion, modify or repeal. Rev. St. §§ 858, 1977. The reason for requiring a Chinese alien, claiming the privilege of remaining in the United States, to prove the fact of his residence here at the time of the passage of the act "by at least one credible white witness," may have been the experience of congress, as mentioned by Mr. Justice Field in Chae Chan Ping's Case, that the enforcement of former acts, under which the testimony of Chinese persons was admitted to prove similar facts, "was attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath." 130 U. S. 598, 9 Sup. Ct. Rep. 627. And this requirement, not allowing such a fact to be proved solely by the testimony of aliens in a like situation, or of the same race, is quite analogous to the provision, which has existed for 77 years in the naturalization laws, by which aliens applying for naturalization must prove their residence within the limits and under the jurisdiction of the United States, for five years next preceding, "by the oath or affirmation of citizens of the United States." Acts March 22, 1816, c. 32, § 2, (3 Stat. 259;) May 24, 1828, c. 116, § 2, (4 Stat. 311;) Rev. St. § 2165, cl. 6; 2 Kent, Comm. 65.

The proceeding before a United States judge, as provided for in section 6 of the act of 1892, is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property without due process of law; and the provisions of the constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application.

The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by congress in the exercise of the powers confided to it by the constitution over this subject.

The three cases now before us do not differ from one another in any material particular.

In the first case the petitioner had wholly neglected, failed, and refused to apply to the collector of internal revenue for a certificate of residence, and, being found without such a certificate after a year from the passage of the act of 1892, was arrested by the United States marshal, with the purpose, as the return states, of taking him before a United States judge within the district; and thereupon, before any further proceeding, sued out a writ of habeas corpus.

In the second case the petitioner had likewise neglected, failed, and refused to apply to the collector of internal revenue for a certificate of residence, and, being found without one, was arrested by the marshal, and taken before the district judge of the United States, who ordered him to be remanded to the custody of the marshal, and to be deported from the United States, in accordance with the provisions of the act. The allegation in the petition that the judge's order was made "without any hearing of any kind" is shown to be untrue by the recital in the order itself (a copy of which is annexed to and made part of the petition) that he had failed to clearly establish to the judge's satisfaction that by reason of accident, sickness, or other unavoidable cause he had been unable to procure a certificate, or that he had procured one, and it had been lost or destroyed.

In the third case the petitioner had, within the year, applied to a collector of internal revenue for a certificate of residence, and had been refused it, because he produced, and could produce, none but Chinese witnesses, to prove the residence necessary to entitle him to a certificate. Being found without a certificate of residence, he was arrested by the marshal, and taken before the United States district judge, and established to the satisfaction of the judge that, because of the collector's refusal to give him a certificate of residence, he was without one by an unavoidable cause; and also proved, by a Chinese witness only, that he was a resident of the United States at the time of the passage of the act of 1892. Thereupon the judge ordered him to be remanded to the custody of the marshal, and to be deported from the United States, as provided in that act.

It would seem that the collector of internal revenue, when applied to for a certifi-

cate, might properly decline to find the requisite fact of residence upon testimony which, by an express provision of the act, would be insufficient to prove that fact at a hearing before the judge. But if the collector might have received and acted upon such testimony, and did, upon any ground, unjustifiably refuse a certificate of residence, the only remedy of the applicant was to prove by competent and sufficient evidence at the hearing before the judge the facts requisite to entitle him to a certificate. To one of those facts—that of residence—the statute, which, for the reasons already stated, appears to us to be within the constitutional authority of congress to enact, peremptorily requires at that hearing the testimony of a credible white witness; and it was because no such testimony was produced that the order of deportation was made.

Upon careful consideration of the subject, the only conclusion which appears to us to be consistent with the principles of international law, with the constitution and laws of the United States, and with the previous decisions of this court, is that in each of these cases the judgment of the circuit court dismissing the writ of habeas corpus is right, and must be affirmed.

Mr. Chief Justice FULLER, Mr. Justice BREWER, and Mr. Justice FIELD dissented.

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STATE OF MINNESOTA v. BARBER.

(10 Sup. Ct. 862, 136 U. S. 313.)

Supreme Court of the United States. May 19, 1890.

Appeal from the circuit court of the United States for the district of Minnesota.

Gordon E. Cole, for appellant. Alpheus H. Snow, L. T. Michener, J. E. McDonald, and John M. Butler, for State of Indiana, (by leave of court.) Jas. O. Broadhead, for State of Missouri, (by leave of court.) W. C. Goudy, Walter H. Sanborn, Wallace Pratt, and Geo. W. McCrary, for appellee.

HARLAN, J. Henry E. Barber, the appellee, was convicted, before a justice of the peace in Ramsey county, Minn., of the offense of having wrongfully and unlawfully offered and exposed for sale, and of having sold, for human food, 100 pounds of fresh, uncured beef, part of an animal slaughtered in the state of Illinois, but which had not been inspected in Minnesota, and "certified" before slaughter by an inspector appointed under the laws of the latter state. Having been committed to the common jail of the county pursuant to a judgment of imprisonment for the term of 30 days, he sued out a writ of *habeas corpus* from the circuit court of the United States for the district of Minnesota, and prayed to be discharged from such imprisonment, upon the ground that the statute of that state, approved April 16, 1889, and under which he was prosecuted, was repugnant to the provision of the constitution giving congress power to regulate commerce among the several states, as well as to the provision declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. Article 1, §8; article 4, § 2. The court below, speaking by Judge NELSON, held the statute to be in violation of both of these provisions, and discharged the prisoner from custody. In re Barber, 39 Fed. Rep. 641. A similar conclusion in reference to the same statute had been previously reached by Judge BLODGETT, holding the circuit court of the United States for the northern district of Illinois. Swift v. Sutphin, Id. 630.

From the judgment discharging Barber the state has prosecuted the present appeal. Rev. St. § 764; 23 St. p. 437, c. 353.

Attorneys representing persons interested in maintaining the validity of a statute of Indiana alleged to be similar to that of Minnesota were allowed to participate in the argument in this court, and to file briefs.

The statute of Minnesota upon the validity of which the decision of the case depends is as follows:

"An act for the protection of the public health by providing for inspection before slaughter of cattle, sheep, and swine designed for slaughter for human food.

"Section 1. The sale of any fresh beef, veal, mutton, lamb, or pork for human food in this state, except as hereinafter provided, is hereby prohibited.

"Sec. 2. It shall be the duty of the several local boards of health of the several cities, villages, boroughs, and townships within this state to appoint one or more inspectors of cattle, sheep, and swine, for said city, village, borough, or township, who shall hold their offices for one year, and until their successors are appointed and qualified, and whose authority and jurisdiction shall be territorially co-extensive with the board so appointing them; and said several boards shall regulate the form of certificate to be issued by such inspectors, and the fees to be paid them by the person applying for such inspection, which fees shall be no greater than are actually necessary to defray the costs of the inspection provided for in section three of this act.

"Sec. 3. It shall be the duty of the inspectors appointed hereunder to inspect all cattle, sheep, and swine slaughtered for human food within their respective jurisdictions within twenty-four hours before the slaughter of the same, and, if found healthy, and in suitable condition to be slaughtered for human food, to give to the applicant a certificate in writing to that effect. If found unfit for food by reason of infectious disease, such inspectors shall order the immediate removal and destruction of such diseased animals, and no liability for damages shall accrue by reason of such action.

"Sec. 4. Any person who shall sell, expose or offer for sale, for human food in this state, any fresh beef, veal, mutton, lamb, or pork whatsoever, which has not been taken from an animal inspected and certified before slaughter, by the proper local inspector appointed hereunder, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one hundred dollars, or by imprisonment not exceeding three months, for each offense.

"Sec. 5. Each and every certificate made by inspectors under the provisions of this act shall contain a statement to the effect that the animal or animals inspected, describing them as to kind and sex, were at the date of such inspection free from all indication of disease, apparently in good health, and in fit condition, when inspected, to be slaughtered for human food; a duplicate of which certificate shall be preserved in the office of the inspector.

"Sec. 6. Any inspector making a false certificate shall be liable to a fine of not less than ten dollars, nor more than fifty dollars, for each animal falsely certified to be fit for human food under the provisions of this act.

"Sec. 7. This act shall take effect and be in force from and after its passage." Gen. Laws Minn. 1889, p. 51, c. 8.

The presumption that this statute was enacted, in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights

granted or secured by the constitution. In such cases the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void. This principle of constitutional interpretation has been often announced by this court. In Henderson v. Mayor, etc., 92 U. S. 259, 268, where a statute of New York, imposing burdensome and almost impossible conditions on the landing of passengers from vessels employed in foreign commerce, was held to be unconstitutional and void as a regulation of such commerce, the court said that, "in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." In People v. Compagnie Gen. Transatlantique, 107 U. S. 59, 63, 2 Sup. Ct. Rep. 87, where the question was as to the validity of a statute of the same state, which was attempted to be supported as an inspection law authorized by section 10, art. 1 of the constitution, and was so designated in its title, it was said: "A state cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease, and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in the title." So, in Soon Hing v. Crowley, 113 U. S. 703, 710, 5 Sup. Ct. Rep. 730: "The rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as to the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments." In Mugler v. Kansas, 123 U. S. 623, 661, 8 Sup. Ct. Rep. 273, the court, after observing that every possible presumption is to be indulged in favor of the validity of a statute, said that the judiciary must obey the constitution, rather than the law-making department of the government, and must, upon its own responsibility, determine whether, in any particular case, the limits of the constitution have been passed. It was added: "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution." Upon the authority of those cases, and others that could be cited, it is our duty to inquire, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether, by its necessary or natural operation, it impairs or destroys rights secured by the constitution of the United States.

Underlying the entire argument in behalf of the state is the proposition that it is impossible to tell, by an inspection of fresh beef, veal, mutton, lamb, or pork, designed for human food, whether or not it came from animals that were diseased when slaughtered; that inspection on the hoof, within a very short time before animals are slaughtered, is the only mode by which their condition can be ascertained with certainty. And it is insisted with great confidence that of this fact the court must take judicial notice. If a fact alleged to exist, and upon which the rights of parties depend, is within common experience and knowledge, it is one of which the courts will take judicial notice. Brown v. Piper, 91 U. S. 37, 42; Phillips v. Detroit, 111 U. S. 604, 606, 4 Sup. Ct. Rep. 580. But we cannot assent to the suggestion that the fact alleged in this case to exist is of that class. It may be the opinion of some that the presence of disease in animals at the time of their being slaughtered cannot be determined by inspection of the meat taken from them; but we are not aware that such is the view universally, or even generally, entertained. But if, as alleged, the inspection of fresh beef, veal, mutton, lamb, or pork will not necessarily show whether the animal from which it was taken was diseased when slaughtered, it would not follow that a statute like the one before us is within the constitutional power of the state to enact. On the contrary, the enactment of a similar statute by each one of the states composing the Union would result in the destruction of commerce among the several states, so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human food, and entirely free from disease. A careful examination of the Minnesota act will place this construction of it beyond question.

The first section prohibits the sale of any fresh beef, veal, mutton, lamb, or pork for human food except as provided in that act. The second and third sections provide that all cattle, sheep, and swine to be slaughtered for human food within the respective jurisdictions of the inspectors shall be inspected, by the proper local inspector appointed in Minnesota, within 24 hours before the animals are slaughtered, and that a certificate shall be made by such inspector showing, if such be the fact, that the animals when slaughtered were found healthy and in suitable condition to be slaughtered for human food. The fourth section makes it a misdemeanor, punishable by fine or imprisonment, for any one to sell, expose or offer for sale, for human food in the state, any fresh beef, veal, mutton, lamb, or pork, not taken from an animal inspected and "certified before slaughter by the proper local inspector" appointed under that act. As the inspection must take place within the 24 hours immediately before the slaughtering, the act, by its necessary operation, excludes from the Minnesota market, practically, all fresh beef, veal, mutton, lamb, or pork—in whatever form, and although entirely sound, healthy, and fit for human food—taken from animals slaughtered in other states, and directly tends to restrict the slaughtering of animals whose meat is to be sold in Minnesota for human food to those engaged in such business in that

state. This must be so, because the time, expense, and labor of sending animals from points outside of Minnesota to points in that state, to be there inspected, and bringing them back, after inspection, to be slaughtered at the place from which they were sent (the slaughtering to take place within 24 hours after inspection, else the certificate of inspection becomes of no value) will be so great as to amount to an absolute prohibition upon sales in Minnesota of meat from animals not slaughtered within its limits. When to this is added the fact that the statute, by its necessary operation, prohibits the sale in the state of fresh beef, veal, mutton, lamb, or pork from animals that may have been inspected carefully and thoroughly in the state where they were slaughtered, and before they were slaughtered, no doubt can remain as to its effect upon commerce among the several states. It will not do to say—certainly no judicial tribunal can with propriety assume—that the people of Minnesota may not, with due regard to their health, rely upon inspections in other states of animals there slaughtered for purposes of human food. If the object of the statute had been to deny altogether the citizens of other states the privilege of selling, within the limits of Minnesota, for human food, any fresh beef, veal, mutton, lamb, or pork from animals slaughtered outside of that state, and to compel the people of Minnesota wishing to buy such meats either to purchase those taken from animals inspected and slaughtered in the state, or to incur the cost of purchasing them, when desired for their own domestic use, at points beyond the state, that object is attained by the act in question. Our duty to maintain the constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota statute. If this legislation does not make such discrimination against the products and business of other states in favor of the products and business of Minnesota as interferes with and burdens commerce among the several states, it would be difficult to enact legislation that would have that result.

The principles we have announced are fully supported by the decisions of this court. In Woodruff v. Parham, 8 Wall. 123, 140, which involved the validity of an ordinance of the city of Mobile, Ala., relating to sales at auction, Mr. Justice MILLER, speaking for this court, said: "There is no attempt to discriminate injuriously against the products of other states, or the rights of their citizens; and the case is not, therefore, an attempt to fetter commerce among the states, or to deprive the citizens of other states of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the constitution which relate to those subjects, and therefore void." So, in Hinson v. Lott, Id. 148, 151, decided at the same time, upon a writ of error from the supreme court of Alabama, it was said, in reference to the opinion of that court: "And it is also true, as conceded in that opinion, that congress has the same right to regulate commerce among the states that it has to regulate commerce with foreign nations, and that, whenever it exercises that power, all conflicting state laws must give way, and that, if congress had made any regulation covering the matter in question, we need inquire no further. That court seems to have relieved itself of the objection by holding that the tax imposed by the state of Alabama was an exercise of the concurrent right of regulating commerce remaining with the states until some regulation on the subject had been made by congress. But, assuming the tax to be, as we have supposed, a discriminating tax, levied exclusively upon the products of sister states, and looking to the consequences which the exercise of this power may produce if it be once conceded, amounting, as we have seen, to a total abolition of all commercial intercourse between the states, under the cloak of the taxing power, we are not prepared to admit that a state can exercise such a power, though congress may have failed to act on the subject in any manner whatever."

In Welton v. Missouri, 91 U. S. 275, 281, the court, speaking by Mr. Justice FIELD, declared to be unconstitutional a statute of Missouri imposing a license tax upon the sale by peddlers of certain kinds of personal property "not the growth, produce, or manufacture" of that state, but which did not impose a like tax upon similar articles grown, produced, or manufactured in Missouri. After observing that, if the tax there in question could be imposed at all, the power of the state could not be controlled, however unreasonable and oppressive its action, the court said: "Imposts operating as an absolute exclusion of the goods would be possible; and all the evils of discriminating state legislation favorable to the interests of one state, and injurious to the interests of other states and countries, which existed previous to the adoption of the constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the states."

In Railroad Co. v. Husen, 95 U. S. 465, the court examined a statute of Missouri prohibiting, under penalties, any Texas, Mexican, or Indian cattle from being driven or otherwise conveyed into, or remaining in, any county of the state, between the 1st day of March and the 1st day of November in each year, by any person or persons whatsoever. While admitting in the broadest terms the power of a state to pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders, to prevent convicts, or persons and animals suffering under contagious or infectious diseases, from entering the state, and, for purposes of protection, to establish quarantine and inspections, the court, Mr. Justice STRONG delivering its opinion, said that a state may not, "under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce." The general ground upon which it held the Missouri statute to be unconstitutional was that its effect was "to obstruct interstate commerce, and to discriminate between the property of citizens

of one state and that of citizens of other states."

In Guy v. Baltimore, 100 U. S. 434, 443, the court adjudged to be void an ordinance of the city of Baltimore, exacting from vessels using the public wharves of that city, and laden with the products of other states, higher rates of wharfage than from vessels using the same wharves, and laden with the products of Maryland. "Such exactions," the court said, "in the name of wharfage, must be regarded as taxation upon interstate commerce. Municipal corporations, owning wharves upon the public navigable waters of the United States, and *quasi* public corporations transporting the products of the country, cannot be permitted, by discriminations of that character, to impede commercial intercourse and traffic among the several states and with foreign nations."

The latest case in this court upon the subject of interstate commerce as affected by local enactments discriminating against the products and citizens of other states is Walling v. Michigan, 116 U. S. 446, 455, 6 Sup. Ct. Rep. 454. We there held to be unconstitutional a statute of M chigan imposing a license tax upon persons not residing, or having their principal place of business, in that state, but whose business was that of selling, or soliciting the sale of, intoxicating liquors to be shipped into the state from places without; a similar tax not being imposed in respect to the sale, and soliciting for sale, of liquors manufactured in Michigan. Mr. Justice BRADLEY, delivering the opinion of the court, said: "A discriminating tax imposed by a state operating to the disadvantage of the products of other states when introduced into the first-mentioned state, is, in effect, a regulation in restraint of commerce among the states, and as such is a usurpation of the power conferred by the constitution upon the congress of the United States."

It is, however, contended in behalf of the state that there is in fact no interference by this statute with the bringing of cattle, sheep, and swine into Minnesota from other states, nor any discrimination against the products or business of other states, for the reason—such is the argument—that the statute requiring an inspection of animals on the hoof as a condition of the privilege of selling or offering for sale in the state the meats taken from them is applicable alike to all owners of such animals, whether citizens of Minnesota or citizens of other states. To this we answer that a statute may upon its face apply equally to the people of all the states, and yet be a regulation of interstate commerce which a state may not establish. A burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statute. Robbins v. Shelby Taxing-Dist., 120 U. S. 489, 497, 7 Sup. Ct. Rep. 592; Case of the State Freight Tax, 15 Wall. 232. The people of Minnesota have as much right to protection against the enactments of that state interfering with the freedom of commerce among the states as have the people of other states. Although this statute is not avowedly or in terms directed against the bringing into Minnesota of the products of other states, its necessary effect is to burden or obstruct commerce with other states, as involved in the transportation into that state, for purposes of sale there, of all fresh beef, veal, mutton, lamb, or pork, however free from disease may have been the animals from which it was taken.

The learned counsel for the state relies with confidence upon Patterson v. Kentucky, 97 U. S. 501, as supporting the principles for which he contends. In that case we sustained the constitutionality of a statute of Kentucky forbidding the sale within that commonwealth of oils or fluids used for illuminating purposes, and the product of coal, petroleum, or other bituminous substances that would ignite at less than a certain temperature. Having a patent from the United States for an improved burning oil, Patterson claimed the right, by virtue of his patent, to sell anywhere in the United States the oil described in it, without regard to the inspection laws of any state enacted to protect the public safety. It was held that the statute of Kentucky was a mere police regulation embodying the deliberate judgment of that commonwealth that burning fluids, the product of coal, petroleum, or other bituminous substances, which would ignite or permanently burn at less than a prescribed temperature are unsafe for illuminating purposes. We said that the patent was not a regulation of commerce, nor a license to sell the patented article, but a grant that no one else should manufacture or sell that article, and therefore a grant simply of an exclusive right in the discovery, which the national authority could protect against all interference; that it was not to be supposed "that congress intended to authorize or regulate the sale within a state of tangible personal property which that state declares to be unfit and unsafe for use, and by statute has prohibited from being sold, or offered for sale, within her limits;" also, that "the right which the patentee or his assignee possesses in the property created by the application of a patented discovery must be enjoyed subject to the complete and salutary power, with which the states have never parted, of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few." Now, the counsel of the state asks: "If the state may, by the exercise of its police power, determine for itself what test shall be made of the safety illuminating oils, and prohibit the sale of all oils not subjected to and sustaining such test, although such oils are manufactured by a process patented under the constitution and laws of the United States, why may it not determine for itself what test shall be made of the wholesomeness and safety of food, and prohibit the sale of all such food not submitted to and sustaining the test, although it may chance that articles otherwise subject to the constitution and laws

of the United States cannot sustain the test?" The analogy, the learned counsel observes, seems close. But it is only seemingly close. There is no real analogy between that case and the one before us. The Kentucky statute prescribed no test of inspection which, in view of the nature of the property, was either unusual or unreasonable, or which by its necessary operation discriminated against any particular oil because of the locality of its production. If it had prescribed a mode of inspection to which citizens of other states, having oils designed for illuminating purposes, and which they desired to sell in the Kentucky market, could not have reasonably conformed, it would undoubtedly have been held to be an unauthorized burden upon interstate commerce. Looking at the nature of the property to which the Kentucky statute had reference, there was no difficulty in the way of the patentee of the particular oil there in question submitting to the required local inspection.

But a law providing for the inspection of animals whose meats are designed for human food cannot be regarded as a rightful exertion of the police powers of the state, if the inspection prescribed is of such a character, or is burdened with such conditions, as will prevent altogether the introduction into the state of sound meats, the product of animals slaughtered in other states. It is one thing for a state to exclude from its limits cattle, sheep, or swine actually diseased, or meats that, by reason of their condition, or the condition of the animals from which they are taken, are unfit for human food, and punish all sales of such animals or of such meats within its limits. It is quite a different thing for a state to declare, as does Minnesota, by the necessary operation of its statute, that fresh beef, veal, mutton, lamb, or pork—articles that are used in every part of this country to support human life—shall not be sold at all for human food within its limits unless the animal from which such meats are taken is inspected in that state, or, as is practically said, unless the animal is slaughtered in that state.

One other suggestion by the counsel for the state deserves to be examined. It is that, so far as this statute is concerned, the people of Minnesota can purchase in other states fresh beef, veal, mutton, lamb, and pork, and bring such meats into Minnesota for their own personal use. We do not perceive that this view strengthens the case of the state, for it ignores the right which the people of other states have in commerce between those states and the state of Minnesota, and it ignores the right of the people of Minnesota to bring into that state, for purposes of sale, sound and healthy meat, wherever such meat may have come into existence. But there is a consideration arising out of the suggestion just alluded to which militates somewhat against the theory that the statute in question is a legitimate exertion of the police powers of the state for the protection of the public health. If every hotel keeper, railroad, or mining corporation, or contractor in Minnesota furnishing subsistence to large numbers of persons, and every private family in that state that is so disposed, can, without violating the statute, bring into the state from other states, and use for their own purposes, fresh beef, veal, mutton, lamb, and pork taken from animals slaughtered outside of Minnesota which may not have been inspected at all, or not within 24 hours before being slaughtered, what becomes of the argument, pressed with so much earnestness, that the health of the people of that state requires that they be protected against the use of meats from animals not inspected in Minnesota within 24 hours before being slaughtered? If the statute, while permitting the sale of meats from animals slaughtered, inspected, and "certified" in that state, had expressly forbidden the introduction from other states, and their sale in Minnesota, of all fresh meats, of every kind, without making any distinction between those that were from animals inspected on the hoof, and those that were not so inspected, its unconstitutionality could not have been doubted. And yet it is so framed that this precise result is attained as to all sales in Minnesota, for human food, of meats from animals slaughtered in other states.

In the opinion of this court, the statute in question, so far as its provisions require, as a condition of sales in Minnesota, of fresh beef, veal, mutton, lamb, or pork, for human food, that the animals from which such meats are taken shall have been inspected in Minnesota before being slaughtered, is in violation of the constitution of the United States, and void.

The judgment discharging the appellee from custody is affirmed.

WILKERSON, Sheriff, v. RAHRER.

(11 Sup. Ct. 865, 140 U. S. 545.)

Supreme Court of the United States. May 25, 1891.

Appeal from the circuit court of the United States for the district of Kansas.

This was an application for a writ of *habeas corpus* made to the circuit court of the United States for the district of Kansas by Charles A. Rahrer, who alleged in his petition that he was illegally and wrongfully restrained of his liberty by John M. Wilkerson, sheriff of Shawnee county, Kan., in violation of the constitution of the United States. The writ was issued, and, return having been made thereto, the cause was heard on the following agreed statement of facts: "It is understood and agreed by and between the attorneys for the petitioner herein and the respondent that the above-entitled application to be discharged upon writ of *habeas corpus* shall be heard and decided upon the following facts, namely: That H. C. Maynard and Lisle Hopkins are citizens and residents of the state of Missouri, and are partners doing business at Kansas City, in the state of Missouri, under the firm name of Maynard, Hopkins & Co.; that said Maynard, Hopkins & Co. are, and were at all the times herein mentioned, doing a general wholesale business in Kansas City, in the state of Missouri, in the sale of intoxicating liquors; that said Maynard, Hopkins & Co. do a general business of packing and shipping intoxicating liquors from their place of business in Kansas City, in the state of Missouri, to various points in the state of Kansas and other states; that in June, 1890, the said Maynard, Hopkins & Co. constituted and appointed the petitioner herein, Charles Rahrer, a citizen of the United States, their lawful agent in the city of Topeka, in the state of Kansas, to sell and dispose of for them in original packages liquors shipped by the said Maynard, Hopkins & Co. from the state of Missouri to Topeka, in the state of Kansas; that in July, 1890, the said Maynard, Hopkins & Co. shipped to the city of Topeka, in the state of Kansas, from Kansas City, in the state of Missouri, a car-load of intoxicating liquors packed by them and shipped from Kansas City, in the state of Missouri, in original packages, which car-load of intoxicating liquors so shipped was taken charge of by the petitioner herein, Charles Rahrer, at Topeka, in the state of Kansas, as the agent of Maynard, Hopkins & Co.; that on the 9th day of August, 1890, the said Charles Rahrer, as agent of the said Maynard, Hopkins & Co., offered for sale and sold in the original package a portion of said liquor, so shipped by the said Maynard, Hopkins & Co., to-wit, one pony keg of beer, being a four-gallon keg, which keg was in the same condition in which it was shipped from Kansas City, in the state of Missouri, to Topeka, in the state of Kansas; that said keg of beer was separate and distinct from all other kegs of beer so shipped, and was shipped as a separate and distinct package by Maynard, Hopkins & Co. from Kansas City, in the state of Missouri; that the petitioner, Charles A. Rahrer, on the 9th day of August, 1890, offered for sale, and sold, one pint of whisky, which was a portion of the liquor shipped by Maynard, Hopkins & Co., as above stated; that said pint of whisky was sold in the same condition in which it was shipped from the state of Missouri and received in the state of Kansas; that it was separate and distinct from every other package of liquor so shipped, and was sold in the same package in which it was received, being securely inclosed in a wooden box of sufficient size to hold said pint bottle of whisky. It is further agreed that Charles A. Rahrer, the petitioner herein, was not the owner of said liquor, but was simply acting as the agent of Maynard, Hopkins & Co., who were the owners of said liquor. That on the 21st day of August, 1890, there was filed in the office of the clerk of the district court of Shawnee county, Kan., an information by R. B. Welch, county attorney of said county, together with affidavit of Otis M. Capron and John C. Butcher appended and attached thereto, and in support thereof, taken under paragraph 2543, Gen. St. 1889, charging the said Charles A. Rahrer with violating the prohibitory liquor law of the state of Kansas by making the two sales hereinbefore mentioned. A copy of said information and affidavits so filed is attached to the return of the respondent herein and is hereby referred to and made a part hereof. That the petitioner herein, Charles A. Rahrer, was arrested upon a warrant issued upon the information and affidavit heretofore referred to, and is held in custody by the respondent, John M. Wilkerson, sheriff of Shawnee county, by reason of said information so filed and said warrant so issued, and not otherwise. Said Charles A. Rahrer was not a druggist, and did not have, nor did his principals, Maynard, Hopkins & Co., have, any druggist's permit at the time of making the said sales of intoxicating liquor hereinbefore mentioned, nor had he or they ever made any application for a druggist's permit to the probate judge of Shawnee county, Kan., before making such sales of intoxicating liquor as aforesaid. The said sales of intoxicating liquors were not made by said Charles A. Rahrer upon a printed or written affidavit of the applicant for such intoxicating liquors, as required under the prohibitory laws of the state of Kansas. A copy of the warrant under and by virtue of which the respondent, John M. Wilkerson, sheriff of Shawnee county, holds the said Charles A. Rahrer is attached to the return of the respondent, and is hereby referred to and made a part hereof. The recent act of congress relating to intoxicating liquors, and known as the 'Wilson Bill,' was signed by the president on August 8, A. D. 1890." The circuit court discharged the petitioner, and the case was brought to this court by appeal. The opinion will be found in 43 Fed. Rep. 556.

The constitution of Kansas provides: "The manufacture and sale of intoxicating liquors shall be forever prohibited in this state, except for medical, scientific, and mechanical purposes." 1 Gen. St. Kan.

1889, p. 107. The sections of the Kansas statutes claimed to have been violated by the petitioner are as follows: "Any person or persons who shall manufacture, sell, or barter any spirituous, malt, vinous, fermented, or other intoxicating liquors shall be guilty of a misdemeanor, and punished as hereinafter provided: provided, however, that such liquors may be sold for medical, scientific, and mechanical purposes, as provided in this act. It shall be unlawful for any person or persons to sell or barter for medical, scientific, or mechanical purposes any malt, vinous, spirituous, fermented, or other intoxicating liquors without first having procured a druggist's permit therefor from the probate judge of the county wherein such druggist may be doing business at the time," etc. "Any person without taking out and having a permit to sell intoxicating liquors as provided in this act, or any person not lawfully and in good faith engaged in the business of a druggist, who shall directly or indirectly sell or barter any spirituous, malt, vinous, fermented or other intoxicating liquors, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars, and be imprisoned in the county jail not less than thirty days nor more than ninety days." 1 Gen. St. Kan. c. 31, §§ 380, 381, 386. On August 8, 1890, an act of congress was approved, entitled "An act to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases," which reads as follows: "That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory, or remaining therein, for use, consumption, sale, or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." 26 St. 313, c. 728.

L. B. Kellogg, *A. L. Williams*, *R. B. Welch*, and *J. N. Ives*, for appellant. *Louis J. Blum*, *Edgar C. Blum*, and *David Overmyer*, for appellee.

Mr. Chief Justice FULLER, after stating the facts as above, delivered the opinion of the court.

The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and essentially exclusive. And this court has uniformly recognized state legislation, legitimately for police purposes, as not, in the sense of the constitution, necessarily infringing upon any right which has been confided expressly or by implication to the national government. The fourteenth amendment, in forbidding a state to make or enforce any law abridging the privileges or immunities of citizens of the United States, or to deprive any person of life, liberty, or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, did not invest, and did not attempt to invest, congress with power to legislate upon subjects which are within the domain of state legislation. As observed by Mr. Justice BRADLEY, delivering the opinion of the court in the Civil Rights Cases, 109 U. S. 3, 13, 3 Sup. Ct. Rep. 18, the legislation under that amendment cannot "properly cover the whole domain of rights appertaining to life, liberty, and property, defining them, and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make congress take the place of the state legislatures, and to supersede them. It is absurd to affirm that, because the rights of life, liberty, and property (which include all civil rights that men have) are by the amendment sought to be protected against invasion on the part of the state without due process of law, congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a state to any persons of the equal protection of the laws is prohibited by the amendment, therefore congress may establish laws for their equal protection." In short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual states, and cannot be assumed by the national government, and that in this respect it is not interfered with by the fourteenth amendment. Barbier v Connolly, 113 U. S. 27, 31, 5 Sup. Ct. Rep. 357. The power of congress to regulate commerce among the several states, when the subjects of that power are national in their nature, is also exclusive. The constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as congress might impose restraint. Therefore it has been determined that the failure of congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states. Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. Rep. 592. And if a law passed by a state, in the exercise of its acknowledged powers, comes into conflict with that will, the congress and the state cannot occupy the position of equal opposing sovereignties, because the constitution declares its supremacy, and that of the laws passed in pursuance thereof. Gibbons v. Ogden, 9 Wheat. 210. That which is not supreme must yield to that which is supreme. Brown v. Maryland, 12 Wheat. 448.

"Commerce, undoubtedly, is traffic," said Chief Justice MARSHALL, "but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescrib-

ing rules for carrying on that intercourse." Unquestionably, fermented, distilled, or other intoxicating liquors or liquids are subjects of commercial intercourse, exchange, barter, and traffic between nation and nation, and between state and state, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of congress, and the decisions of courts. Nevertheless, it has been often held that state legislation which prohibits the manufacture of spirituous, malt, vinous, fermented, or other intoxicating liquors within the limits of a state, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the constitution of the United States, or by the amendments thereto. Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273, and cases cited. "These cases," in the language of the opinion in Mugler v. Kansas, (page 659, 123 U. S., page 296, 8 Sup. Ct. Rep.,) "rest upon the acknowledged right of the states of the Union to control their purely internal affairs, and, in so doing, to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government, or violate rights secured by the constitution of the United States. The power to establish such regulations, as was said in Gibbons v. Ogden, 9 Wheat. 1, 203, reaches everything within the territory of a state not surrendered to the national government." But it was not thought in that case that the record presented any question of the invalidity of state laws, because repugnant to the power to regulate commerce among the states. It is upon the theory of such repugnancy that the case before us arises, and involves the distinction which exists between the commercial power and the police power, which, "though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them." 12 Wheat. 441. And here the sagacious observations of Mr. Justice CATRON, in the License Cases, 5 How. 599, may profitably be quoted, as they have often been before: "The law and the decision apply equally to foreign and to domestic spirits, as they must do on the principles assumed in support of the law. The assumption is that the police power was not touched by the constitution, but left to the states as the constitution found it. This is admitted; and whenever a thing, from character or condition, is of a description to be regulated by that power in the state, then the regulation may be made by the state, and congress cannot interfere. But this must always depend on fact, subject to legal ascertainment, so that the injury may have redress. And the fact must find its support in this, whether the prohibited article belongs to, and is subject to be regulated as part of, foreign commerce, or of commerce among the states. If, from its nature, it does not belong to commerce, or of its condition, from putrescence or other cause, is such, when it is about to enter the state, that it no longer belongs to commerce, or, in other words, is not a commercial article, then the state power may exclude its introduction; and, as an incident to this power, a state may use means to ascertain the fact. And here is the limit between the sovereign power of the state and the federal power; that is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state, and that which does belong to commerce is within the jurisdiction of the United States. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this court in the cases of Gibbons v. Ogden, Brown v. Maryland, and New York v. Miln, [11 Pet. 102.] What, then, is the assumption of the state court? Undoubtedly, in effect, that the state had the power to declare what should be an article of lawful commerce in the particular state; and, having declared that ardent spirits and wines were deleterious to morals and health, they ceased to be commercial commodities there, and that then the police power attached, and consequently the powers of congress could not interfere. The exclusive state power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the state laws, and asserted as the state policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the state is attempted to be created in a case where it did not previously exist. If this be the true construction of the constitutional provision, then the paramount power of congress to regulate commerce is subject to a very material limitation, for it takes from congress, and leaves with the states, the power to determine the commodities or articles of property which are the subjects of lawful commerce. Congress may regulate, but the states determine what shall or shall not be regulated. Upon this theory, the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated. The same process of legislation and reasoning adopted by the state and its courts could bring within the police power any article of consumption that a state might wish to exclude, whether it belonged to that which was drank, or to food and clothing; and with nearly equal claims to propriety, as malt liquors and the produce of fruits other than grapes stand on no higher grounds than the light wines of this and other countries, excluded, in effect, by the law as it now stands. And it would be only another step to regulate

real or supposed extravagance in food and clothing. And in this connection it may be proper to say that the three states whose laws are now before us had in view an entire prohibition from use of spirits and wines of every description, and that their main scope and object is to enforce exclusive temperance as a policy of state, under the belief that such a policy will best subserve the interests of society, and that to this end, more than to any other, has the sovereign power of these states been exerted; for it was admitted, on the argument, that no licenses are issued, and that exclusion exists, so far as the laws can produce the result,—at least in some of the states,—and that this was the policy of the law. For these reasons I think the case cannot depend on the reserved power in the state to regulate its own police." And the learned judge reached the conclusion that the law of New Hampshire, which particularly raised the question, might be sustained as a regulation of commerce, lawful, because not repugnant to any actual exercise of the commercial power by congress. In respect of this, the opposite view has since prevailed; but the argument retains its force in its bearing upon the purview of the police power as not concurrent with, and necessarily not superior to, the commercial power. The laws of Iowa under consideration in Bowman v. Railway Co., 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062, and Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. Rep. 681, were enacted in the exercise of the police power of the state, and not at all as regulations of commerce with foreign nations and among the states; but as they inhibited the receipt of an imported commodity, or its disposition before it had ceased to become an article of trade between one state and another, or another country and this, they amounted in effect to a regulation of such commerce. Hence it was held that inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as congress did not pass any law to regulate it specifically, or in such way as to allow the laws of the state to operate upon it, congress thereby indicated its will that such commerce should be free and untrammeled; and therefore that the laws of Iowa, referred to, were inoperative in so far as they amounted to regulations of foreign or interstate commerce in inhibiting the reception of such articles within the state, or their sale upon arrival, in the form in which they were imported there from a foreign country or another state. It followed as a corollary that, when congress acted at all, the result of its action must be to operate as a restraint upon that perfect freedom which its silence insured. Congress has now spoken, and declared that imported liquors or liquids shall, upon arrival in a state, fall within the category of domestic articles of a similar nature. Is the law open to constitutional objection?

By the first clause of section 10 of article 1 of the constitution, certain powers are enumerated which the states are forbidden to exercise in any event; and by clauses 2 and 3, certain others, which may be exercised with the consent of congress. As to those in the first class, congress cannot relieve from the positive restriction imposed. As to those in the second, their exercise may be authorized; and they include the collection of the revenue from imposts and duties on imports and exports by state enactments, subject to the revision and control of congress; and a tonnage duty, to the exaction of which only the consent of congress is required. Beyond this, congress is not empowered to enable the state to go in this direction. Nor can congress transfer legislative powers to a state, nor sanction a state law in violation of the constitution; and if it can adopt a state law as its own, it must be one that it would be competent for it to enact itself, and not a law passed in the exercise of the police power. Cooley v. Board, 12 How. 299; Gunn v. Barry, 15 Wall. 610, 623; U. S. v. Dewitt, 9 Wall. 41. It does not admit of argument that congress can neither delegate its own powers, nor enlarge those of a state. This being so, it is urged that the act of congress cannot be sustained as a regulation of commerce, because the constitution, in the matter of interstate commerce, operates *ex proprio vigore* as a restraint upon the power of congress to so regulate it as to bring any of its subjects within the grasp of the police power of the state. In other words, it is earnestly contended that the constitution guaranties freedom of commerce among the states in all things, and that not only may intoxicating liquors be imported from one state into another without being subject to regulation under the laws of the latter, but that congress is powerless to obviate that result. Thus the grant to the general government of a power designed to prevent embarrassing restrictions upon interstate commerce by any state would be made to forbid any restraint whatever. We do not concur in this view. In surrendering their own power over external commerce, the states did not secure absolute freedom in such commerce, but only the protection from encroachment afforded by confiding its regulation exclusively to congress. By the adoption of the constitution, the ability of the several states to act upon the matter solely in accordance with their own will was extinguished, and the legislative will of the general government substituted. No affirmative guaranty was thereby given to any state of the right to demand, as between it and the others, what it could not have obtained before; while the object was undoubtedly sought to be attained of preventing commercial regulations partial in their character or contrary to the common interests. And the magnificent growth and prosperity of the country attest the success which has attended the accomplishment of that object. But this furnishes no support to the position that congress could not, in the exercise of the discretion reposed in it, concluding that the common interests did not require entire freedom in the traffic in ardent spirits, enact the law in question. In so doing, congress has not attempted

to delegate the power to regulate commerce, or to exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws. It has taken its own course, and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property. The principle upon which local option laws, so called, have been sustained, is that, while the legislature cannot delegate its power to make a law, it can make a law which leaves it to municipalities or the people to determine some fact or state of things, upon which the action of the law may depend. But we do not rest the validity of the act of congress on this analogy. The power over interstate commerce is too vital to the integrity of the nation to be qualified by any refinement of reasoning. The power to regulate is solely in the general government, and it is an essential part of that regulation to prescribe the regular means for accomplishing the introduction and incorporation of articles into and with the mass of property in the country or state. 12 Wheat. 448. No reason is perceived why, if congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so. The differences of opinion which have existed in this tribunal in many leading cases upon this subject have arisen, not from a denial of the power of congress, when exercised, but upon the question whether the inaction of congress was in itself equivalent to the affirmative interposition of a bar to the operation of an undisputed power possessed by the states. We recall no decision giving color to the idea that, when congress acted, its action would be less potent than when it kept silent. The framers of the constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject-matter specifically committed to its charge. The manner of that disposition brought into determination upon this record involves no ground for adjudging the act of congress inoperative and void.

We inquire, then, whether fermented, distilled, or other intoxicating liquors or liquids transported into the state of Kansas, and there offered for sale and sold, after the passage of the act, became subject to the operation and effect of the existing laws of that state in reference to such articles. It is said that this cannot be so, because, by the decision in Leisy v. Hardin, similar state laws were held unconstitutional in so far as they prohibited the sale of liquors by the importer in the condition in which they had been imported. In that case, certain beer imported into Iowa had been seized in the original packages or kegs, unbroken and unopened, in the hands of the importer, and the supreme court of Iowa held this seizure to have been lawful under the statutes of the state. We reversed the judgment upon the ground that the legislation to the extent indicated—that is to say, as construed to apply to importations into the state from without, and to permit the seizure of the articles before they had by sale or other transmutation become a part of the common mass of property of the state—was repugnant to the third clause of section 8 of article 1 of the constitution of the United States, in that it could not be given that operation without bringing it into collision with the implied exercise of a power exclusively confided to the general government. This was far from holding that the statutes in question were absolutely void, in whole or in part, and as if they had never been enacted. On the contrary, the decision did not annul the law, but limited its operation to property strictly within the jurisdiction of the state. In Railway Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. Rep. 462, it was held that the act of the legislature of the state of Minnesota of March 7, 1887, establishing a railroad and warehouse commission, as construed by the supreme court of that state, by which construction we were bound in considering the case, was in conflict with the constitution of the United States in the particulars complained of by the railroad company; but, nevertheless, the case was remanded, with an instruction for further proceedings. And Mr. Justice BLATCHFORD, speaking for this court, said: "In view of the opinion delivered by that court, it may be impossible for any further proceedings to be taken other than to dismiss the proceeding for a *mandamus*, if the court should adhere to its opinion that, under the statute, it cannot investigate judicially the reasonableness of the rates fixed by the commission." In Tiernan v. Rinker, 102 U. S. 123, an act of the legislature of the state of Texas levying a tax upon the occupation of selling liquors, malt and otherwise, but not of selling domestic wines or beer, was held inoperative so far as it discriminated against imported wines or beer; but, as Tiernan was a seller of other liquors as well as domestic, the tax against him was upheld. In the case at bar, petitioner was arrested by the state authorities for selling imported liquor on the 9th of August, 1890, contrary to the laws of the state. The act of congress had gone into effect on the 8th of August, 1890, providing that imported liquors should be subject to the operation and effect of the state laws to the same extent and in the same manner as though the liquors had been produced in the state; and the law of Kansas forbade the sale. Petitioner was thereby prevented from claiming the right to proceed in defiance of the laws of the state, upon the implication arising from the want of action on the part of congress up to that time. The laws of the state had been passed in the exercise of its police powers, and applied to the sale of all intoxicating liquors whether imported or not, there being no exception as to those imported, and no inference arising, in view of the provisions of the state constitution and the terms of the law, (within whose mischief all intoxicating liquors came,) that the state did not intend imported liquors to be included. We do not

mean that the intention is to be imputed of violating any constitutional rule, but that the state law should not be regarded as less comprehensive than its language is, upon the ground that action under it might in particular instances be adjudged invalid from an external cause. Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction.

It appears from the agreed statement of facts that this liquor arrived in Kansas prior to the passage of the act of congress, but no question is presented here as to the right of the importer in reference to the withdrawal of the property from the state, nor can we perceive that the congressional enactment is given a retrospective operation by holding it applicable to a transaction of sale occurring after it took effect. This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to congress, but of a law which it was competent for the state to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of congress. That act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a re-enactment of the state law was required before it could have the effect upon imported which it had always had upon domestic property. Jurisdiction attached, not in virtue of the law of congress, but because the effect of the latter was to place the property where jurisdiction could attach. The decree is reversed, and the cause remanded for further proceedings in conformity with this opinion.

HARLAN, GRAY, and BREWER, JJ., concurred in the judgment of reversal, but not in all the reasoning of the opinion of the court.

BUDD v. PEOPLE OF STATE OF NEW YORK. (No. 719.) PEOPLE OF STATE OF NEW YORK ex rel. ANNAN v. WALSH, Police Justice, et al. (No. 644.) PEOPLE OF STATE OF NEW YORK ex rel. PINTO v. SAME. (No. 645.)[1]

(12 Sup. Ct. 468, 143 U. S. 517.)

Supreme Court of the United States. Feb. 29, 1892.

In error to the superior court of Buffalo, state of New York. In error to the supreme court of the state of New York. Affirmed.

B. F. Tracy and *W. N. Dykman*, for plaintiff in error in 644 and 645. *C. F. Tabor*, Atty. Gen., and *J. A. Hyland*, for defendants in error in 644 and 645. *Blair Lee* and *Spencer Clinton*, for plaintiff in error in 719. *C. F. Tabor*, Atty. Gen., and *G. T. Quimby*, for defendant in error in 719.

Mr. Justice BLATCHFORD delivered the opinion of the court.

On the 9th of June, 1888, the governor of the state of New York approved an act, chapter 581 of the Laws of New York of 1888, which had been passed by the two houses of the legislature, three-fifths being present, entitled "An act to regulate the fees and charges for elevating, trimming, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this state." The act was in these words: "Section 1. The maximum charge for elevating, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this state shall not exceed the following rates, namely: For elevating, receiving, weighing, and discharging grain, five-eighths of one cent a bushel. In the process of handling grain by means of floating and stationary elevators, the lake vessels or propellers, the ocean vessels or steam-ships, and canal-boats, shall only be required to pay the actual cost of trimming or shoveling to the leg of the elevator when unloading, and trimming cargo when loading. Sec. 2. Any person or persons violating the provisions of this act shall, upon conviction thereof, be adjudged guilty of a misdemeanor, and be punished by a fine of not less than two hundred and fifty dollars, and costs thereof. Sec. 3. Any person injured by the violation of the provisions of this act may sue for and recover any damages he may sustain against any person or persons violating said provisions. Sec. 4. This act shall not apply to any village, town, or city having less than one hundred and thirty thousand population. Sec. 5. This act shall take effect immediately."

On the 26th of November, 1888, an indictment, which had been found by the grand jury of Erie county, New York, in the court of sessions of that county, against J. Talman Budd, for charging and receiving fees for elevating, receiving, weighing, and discharging grain into and from a stationary elevator and warehouse, contrary to the provisions of said statute, came on trial before a criminal term of the superior court of Buffalo, Erie county.

The charge in the indictment was that Budd, at Buffalo, on the 19th of September, 1888, being manager of the Wells elevator, which was an elevator and warehouse for receiving and discharging grain in the city of Buffalo, that city being a municipal corporation duly organized in pursuance of the laws of the state of New York and having a population of upwards of 130,000 people, did receive, elevate, and weigh from the propeller called the "Oceanica," the property of the Lehigh Valley Transportation Company, a body corporate, 51,000 bushels of grain and corn, the property of said company, into the said Wells elevator, and unlawfully exacted from said company, for elevating, receiving, weighing, and discharging said grain and corn, the sum of one cent a bushel, and also exacted from said company, for shoveling to the leg of the elevator, in the unloading of said 51,000 bushels of grain and corn, $1.75 for every 1,000 bushels thereof, over and above the actual cost of such shoveling.

The facts set forth in the indictment were proved, and the defendant's counsel requested the court to instruct the jury to render a verdict of acquittal, on the ground that the prosecution was founded on a statute which was in conflict both with the constitution of the United States and with that of the state of New York; that the services rendered by Budd, for which the statute assumed to fix a price, were not public in their nature; that neither the persons rendering them, nor the elevator in question, had received any privilege from the legislature; and that such elevator was not a public warehouse, and received no license. The court declined to direct a verdict of acquittal, and the defendant excepted.

The court charged the jury that it was claimed by the prosecution that the defendant had violated the statute in charging more than five-eighths of one cent a bushel for elevating, receiving, weighing, and discharging the grain, and in charging more than the actual cost of trimming or shoveling to the leg of the elevator, in unloading the propeller; that the statute was constitutional; and that the jury should find the defendant guilty as charged in the indictment, if they believed the facts which had been adduced. The defendant excepted to that part of the charge which instructed the jury that they might find the defendant guilty of exacting an excessive rate for shoveling to the leg of the elevator, and also to that part which instructed the jury that they might convict the defendant for having exacted an excessive rate for elevating, receiving, weighing, and discharging the grain and corn.

The jury brought in a verdict of guilty as charged in the indictment, and the court sentenced the defendant to pay a fine of $250, and, in default thereof, to stand committed to the common jail of Erie county for a period not exceeding one day for each dollar of said fine. The defendant appealed from that judgment to

[1] Dissenting opinion of Mr. Justice Brewer omitted.

the general term of the superior court of Buffalo, which affirmed the judgment. He then appealed to the court of appeals of New York, which affirmed the judgment of the superior court of Buffalo; and the latter court afterwards entered a judgment making the judgment of the court of appeals its judgment. The defendant then sued out from this court a writ of error directed to the superior court of Buffalo.

The opinion of the court of appeals is reported in 117 N. Y. 1, 22 N. E. Rep. 670. It was delivered by Judge ANDREWS, with whom Chief Judge RUGER and Judges EARL, DANFORTH, and FINCH concurred. Judges PECKHAM and GRAY dissented; Judge GRAY giving a dissenting opinion, and Judge PECKHAM adhering to the dissenting opinion which he gave in the case of People v. Walsh, 117 N. Y. 621, 22 N. E. Rep. 682.

On the 22d of June, 1888, a complaint on oath was made before ANDREW WALSH, police justice of the city of Brooklyn, N. Y., that on the preceding day one Edward Annan, a resident of that city, had violated the provisions of chapter 581 of the Laws of New York of 1888, by exacting from the complainant more than five-eighths of one cent per bushel for elevating, weighing, receiving, and discharging a boat-load of grain from a canal-boat to an ocean steamer, and by exacting from the canal-boat and its owner more than the actual cost of trimming or shoveling to the leg of the elevator, and by charging against the ocean steamer more than the actual cost of trimming the cargo; the services being rendered by a floating elevator of which Annan was part owner and one of the agents. On this complaint, Annan was arrested and brought before the police justice, who took testimony in the case, and committed Annan to the custody of the sheriff of the county of Kings to answer the charge before a court of special sessions in the city of Brooklyn. Thereupon writs of *habeas corpus* and *certiorari* were granted by the supreme court of the state of New York, on the application of Annan, returnable before the general term of that court in the first instance, but, on a hearing thereon, the writs were dismissed, and Annan was remanded to the custody of the sheriff. The opinion of the general term is reported in 2 N. Y. Supp. 275. Annan appealed to the court of appeals, which affirmed the order of the general term, (117 N. Y. 621, 22 N. E. Rep. 682,) for the reasons set forth in the opinion in the Case of Budd, 117 N. Y. 1, 22 N. E. Rep. 670; and the judgment of the court of appeals was afterwards made the judgment of the supreme court. Annan sued out a writ of error from this court, directed to the supreme court of the state of New York.

Like proceedings to the foregoing were had in the case of one Francis E. Pinto; the charge against him being that he had exacted from the complainant more than five-eighths of one cent per bushel for receiving and weighing a cargo of grain from a boat into the Pinto stores, of which he was lessee and manager, the same being a stationary grain elevator on land in the city of Brooklyn, N. Y., and had exacted more than the actual cost of trimming or shoveling to the leg of the elevator. Pinto sued out from this court a writ of error to the supreme court of the state of New York.

The main question involved in these cases is whether this court will adhere to its decision in Munn v. Illinois, 94 U. S. 113.

The court of appeals of New York, in People v. Budd, 117 N. Y. 1, 22 N. E. Rep. 670, held that chapter 581 of the Laws of 1888 did not violate the constitutional guaranty protecting private property, but was a legitimate exercise of the police power of the state over a business affected with a public interest. In regard to the indictment against Budd, it held that the charge of exacting more than the statute rate for elevating was proved, and that as to the alleged overcharge for shoveling, it appeared that the carrier was compelled to pay $4 for each 1,000 bushels of grain, which was the charge of the shovelers' union, by which the work was performed, and that the union paid the elevator, for the use of the latter's steam-shovel, $1.75 for each 1,000 bushels. The court held that t[illegible] error in submitting to the ju[illegible]ion as to the overcharge for [illegible]hat the intention of the sta[illegible]o confine the charge to the "a[illegible] of the outside labor required; [illegible] a violation of the act in that par[illegible]s proved; but that, as the verdi[illegible] sentence were justified by proof o[illegible] rcharge for elevating, even if the [illegible] overcharge for shoveling was not ma[illegible]oat, the ruling of the superior court of Buffalo could not have prejudiced Budd. Of course, this court, in these cases, can consider only the federal questions involved.

It is claimed, on behalf of Budd, that the statute of the state of New York is unconstitutional, because contrary to the provisions of section 1 of the fourteenth amendment to the constitution of the United States, in depriving the citizen of his property without due process of law; that it is unconstitutional in fixing the maximum charge for elevating, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses at five-eighths of one cent a bushel, and in forbidding the citizen to make any profit upon the use of his property or labor; and that the police power of the state extends only to property or business which is devoted by its owner to the public by a grant to the public of the right to demand its use. It is claimed on behalf of Annan and Pinto that floating and stationary elevators in the port of New York are private property, not affected with any public interest, and not subject to the regulation of rates.

"Trimming" in the canal-boat, spoken of in the statute, is shoveling the grain from one place to another, and is done by longshoremen with scoops or shovels; and "trimming" the ship's cargo when loading is stowing it and securing it for the voyage. Floating elevators are, primarily, boats. Some are scows, and have to be towed from place to place by steam tugs; but the majority are propellers.

When the floating elevator arrives at the ship, and makes fast along-side of her, the canal-boat carrying the grain is made fast on the other side of the elevator. A long wooden tube, called "the leg of the elevator," and spoken of in the statute, is lowered from the tower of the elevator so that its lower end enters the hold of the canal-boat in the midst of the grain. The "spout" of the elevator is lowered into the ship's hold. The machinery of the elevator is then set in motion, the grain is elevated out of the canal-boat, received and weighed in the elevator, and discharged into the ship. The grain is lifted in "buckets" fastened to an endless belt, which moves up and down in the leg of the elevator. The lower end of the leg is buried in the grain so that the buckets are submerged in it. As the belt moves, each bucket goes up full of grain, and at the upper end of the leg, in the elevator tower, empties its contents into the hopper which receives the grain. The operation would cease unless the grain was trimmed or shoveled to the leg as fast as it is carried up by the buckets. There is a gang of longshoremen who shovel the grain from all parts of the hold of the canal-boat to "the leg of the elevator," so that the buckets may be always covered with grain at the lower end of the leg. This "trimming or shoveling to the leg of the elevator," when the canal-boat is unloading, is that part of the work which the elevator owner is required to do at the "actual cost."

In the Budd and Pinto Cases the elevator was a stationary one, on land; and in the Annan Case it was a floating elevator. In the Budd Case the court of appeals held that the words "actual cost," used in the statute, were intended to exclude any charge by the elevator beyond the sum specified for the use of its machinery in shoveling, and the ordinary expenses of operating it, and to confine the charge to the actual cost of the outside labor required for trimming and bringing the grain to the leg of the elevator; and that the purpose of the statute could be easily evaded and defeated if the elevator owner were permitted to separate the services, and charge for the use of the steam-shovel any sum which might be agreed upon between him and the shovelers' union, and thereby, under color of charging for the use of his steam-shovel, exact from the carrier a sum for elevating beyond the rate fixed therefor by the statute.

The court of appeals, in its opinion in the Budd Case, considered fully the question as to whether the legislature had power, under the constitution of the state of New York, to prescribe a maximum charge for elevating grain by stationary elevators, owned by individuals or corporations who had appropriated their property to that use, and were engaged in that business; and it answered the inquiry in the affirmative. It also reviewed the case of Munn v. Illinois, 94 U. S. 113, and arrived at the conclusion that this court there held that the legislation in question in that case was a lawful exercise of legislative power, and did not infringe that clause of the fourteenth amendment to the constitution of the United States which provides that no state shall "deprive any person of life, liberty, or property without due process of law;" and that the legislation in question in that case was similar to, and not distinguishable in principle from, the act of the state of New York.

In regard to Munn v. Illinois the court of appeals said that the question in that case was raised by an individual owning an elevator and warehouse in Chicago, erected for, and in connection with which he had carried on, the business of elevating and storing grain, many years prior to the passage of the act in question, and prior also to the adoption of the amendment to the constitution of Illinois, in 1870, declaring all elevators and warehouses where grain or other property is stored for a compensation to be public warehouses. The court of appeals then cited the cases of People v. Railroad Co., 70 N. Y. 569; Bertholf v. O'Reilly, 74 N. Y. 509; Buffalo, E. S. R. Co. v. Buffalo, St. R. Co., 111 N. Y. 132, 19 N. E. Rep. 63; and People v. King, 110 N. Y. 418, 18 N. E. Rep. 245,—as cases in which Munn v. Illinois had been referred to by it, and said that it could not overrule and disregard Munn v. Illinois without subverting the principle of its own decision in People v. King, and certainly not without disregarding many of its deliberate expressions in approval of the principle of Munn v. Illinois.

The court of appeals further examined the question whether the power of the legislature to regulate the charge for elevating grain, where the business was carried on by individuals upon their own premises, fell within the scope of the police power, and whether the statute in question was necessary for the public welfare. It affirmed that, while no general power resided in the legislature to regulate private business, prescribe the conditions under which it should be conducted, fix the price of commodities or services, or interfere with freedom of contract, and while the merchant, manufacturer, artisan, and laborer, under our system of government, are left to pursue and provide for their own interests in their own way, untrammeled by burdensome and restrictive regulations, which, however common in rude and irregular times, are inconsistent with constitutional liberty, yet there might be special conditions and circumstances which brought the business of elevating grain within principles which by the common law and the practice of free governments, justified legislative control and regulation in the particular case, so that the statute would be constitutional; that the control which, by common law and by statute, was exercised over common carriers, was conclusive upon the point that the right of the legislature to regulate the charges for services in connection with the use of property did not depend in every case upon the question whether there was a legal monopoly, or whether special governmental privileges or protection had been bestowed; that there were elements of publicity in the business of elevating grain which peculi-

iarly affected it with a public interest; that those elements were found in the nature and extent of the business, its relation to the commerce of the state and country, and the practical monopoly enjoyed by those engaged in it; that about 120,000,000 bushels of grain come annually to Buffalo from the west; that the business of elevating grain at Buffalo is connected mainly with lake and canal transportation; that the grain received at New York in 1887 by way of the Erie canal and Hudson river, during the season of canal navigation, exceeded 46,000,000 bushels,—an amount very largely in excess of the grain received during the same period by rail, and by river and coast-wise vessels; that the elevation of that grain from lake vessels to canal-boats takes place at Buffalo, where there are 30 or 40 elevators, stationary and floating; that a large proportion of the surplus cereals of the country passes through the elevators at Buffalo, and finds its way through the Erie canal and Hudson river to the seaboard at New York, whence it is distributed to the markets of the world; that the business of elevating grain is an incident to the business of transportation, the elevators being indispensable instrumentalities in the business of the common carrier, and in a broad sense performing the work of carriers, being located upon or adjacent to the waters of the state, and transferring the cargoes of grain from the lake vessels to the canal-boats, or from the canal-boats to the ocean vessels, and thereby performing an essential service in transportation; that by their means the transportation of grain by water from the upper lakes to the seaboard is rendered possible; that the business of elevating grain thus has a vital relation to commerce in one of its most important aspects; that every excessive charge made in the course of the transportation of grain is a tax upon commerce; that the public has a deep interest that no exorbitant charges shall be exacted at any point upon the business of transportation; and that whatever impaired the usefulness of the Erie canal as a highway of commerce involved the public interest.

The court of appeals said that, in view of the foregoing exceptional circumstances, the business of elevating grain was affected with a public interest, within the language of Lord Chief Justice Hale, in his treatise *De Portibus Maris*, (Harg. Law Tracts, 78;) that the case fell within the principle which permitted the legislature to regulate the business of common carriers, ferrymen, and hackmen, and interest on the use of money; that the underlying principle was that business of certain kinds holds such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation; and that the court rested the power of the legislature to control and regulate elevator charges upon the nature and extent of the business, the existence of a virtual monopoly, the benefit derived from the Erie canal's creating the business and making it possible, the interest to trade and commerce, the relation of the business to the property and welfare of the state, and the practice of legislation in analogous cases, collectively creating an exceptional case and justifying legislative regulation.

The opinion further said that the criticism to which the case of Munn v. Illinois had been subjected proceeded mainly upon a limited and strict construction and definition of the police power; that there was little reason, under our system of government, for placing a close and narrow interpretation on the police power, or restricting its scope so as to hamper the legislative power in dealing with the varying necessities of society, and the new circumstances, as they arise, calling for legislative intervention in the public interest; and that no serious invasion of constitutional guaranty by the legislature could withstand for a long time the searching influence of public opinion, which was sure to come sooner or later to the side of law, order, and justice, however it might have been swayed for a time by passion or prejudice, or whatever aberrations might have marked its course.

We regard these views which we have referred to as announced by the court of appeals of New York, so far as they support the validity of the statute in question, as sound and just.

In Munn v. Illinois the constitution of Illinois, adopted in 1870, provided, in article 13, section 1, as follows: "All elevators or store-houses where grain or other property is stored for a compensation, whether the property stored be kept separated or not, are declared to be public warehouses;" and the act of the legislature of Illinois approved April 25, 1871, (Public Laws of Illinois of 1871-72, p. 762,) divided public warehouses into three classes, prescribed the taking of a license, and the giving of a bond, and fixed a maximum charge for warehouses belonging to class A, for storing and handling grain, including the cost of receiving and delivering, and imposed a fine on conviction for not taking the license or not giving the bond. Munn and Scott were indicted, convicted, and fined for not taking out the license, and not giving the bond, and for charging rates for storing and handling grain higher than those established by the act. Section 6 of the act provided that it should be the duty of every warehouseman of class A to receive for storage any grain that might be tendered to him. Munn and Scott were the managers and lessees of a public warehouse, such as was named in the statute. The supreme court of Illinois having affirmed the judgment of conviction against them, on the ground that the statute of Illinois was a valid and constitutional enactment, (Munn v. People, 69 Ill. 80,) they sued out a writ of error from this court, and contended that the provisions of the sections of the statute of Illinois which they were charged with having violated were repugnant to the third clause of section 8 of article 1, and the sixth clause of section 9 of article 1, of the constitution of the United States, and to the fifth and fourteenth amendments of that constitution.

This court, in Munn v. Illinois, the opinion being delivered by Chief Justice WAITE, and there being a published dissent by only two justices, considered carefully the question of the repugnancy of the Illinois statute to the fourteenth amendment. It said that, under the powers of government inherent in every sovereignty, "the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good;" and that, "in their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, inn-keepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold." It was added: "To this day, statutes are to be found in many of the states upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property." It announced as its conclusions that, down to the time of the adoption of the fourteenth amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law; that, when private property was devoted to a public use, it was subject to public regulation; that Munn and Scott, in conducting the business of their warehouse, pursued a public employment and exercised a sort of public office, in the same sense as did a common carrier, miller, ferryman, inn-keeper, wharfinger, baker, cartman, or hackney coachman; that they stood in the very gateway of commerce, and took toll from all who passed; that their business tended "to a common charge," and had become a thing of public interest and use; that the toll on the grain was a common charge; and that, according to Lord Chief Justice Hale, every such warehouseman "ought to be under a public regulation, viz.," that he "take but reasonable toll."

This court further held, in Munn v. Illinois, that the business in question was one in which the whole public had a direct and positive interest: that the statute of Illinois simply extended the law so as to meet a new development of commercial progress; that there was no attempt to compel the owners of the warehouses to grant the public an interest in their property, but to declare their obligations if they used it in that particular manner; that it mattered not that Munn and Scott had built their warehouses and established their business before the regulations complained of were adopted; that, the property being clothed with a public interest, what was a reasonable compensation for its use was not a judicial, but a legislative, question; that, in countries where the common law prevailed, it had been customary from time immemorial for the legislature to declare what should be a reasonable compensation under such circumstances, or to fix a maximum, beyond which any charge made would be unreasonable; that the warehouses of Munn and Scott were situated in Illinois, and their business was carried on exclusively in that state; that the warehouses were no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another; that their regulation was a thing of domestic concern; that, until congress acted in reference to their interstate relations, the state might exercise all the powers of government over them, even though in so doing it might operate indirectly upon commerce outside its immediate jurisdiction; and that the provision of section 9 of article 1 of the constitution of the United States operated only as a limitation of the powers of congress, and did not affect the states in the regulation of their domestic affairs. The final conclusion of the court was that the act of Illinois was not repugnant to the constitution of the United States, and the judgment was affirmed.

In Sinking Fund Cases, 99 U. S. 700, 747, Mr. Justice BRADLEY, who was one of the justices who concurred in the opinion of the court in Munn v. Illinois, speaking of that case, said: "The inquiry there was as to the extent of the police power in cases where the public interest is affected, and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen,—in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community,—it is subject to regulation by the legislative power." Although this was said in a dissenting opinion in Sinking Fund Cases, it shows what Mr. Justice BRADLEY regarded as the principle of the decision in Munn v. Illinois.

In Water-Works v. Schottler, 110 U. S. 347, 354, 4 Sup. Ct. Rep. 48, this court said "that it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in Munn v. Illinois, 94 U. S. 113. As was said in that case, such regulations do not deprive a person of his property without due process of law."

In Railroad Co. v. Illinois, 118 U. S. 557, 569, 7 Sup. Ct. Rep. 4, Mr. Justice MILLER, who had concurred in the judgment in Munn v. Illinois, referred, in delivering the opinion of the court, to that case, and said: "That case presented the question of a private citizen, or unincorporated partnership, engaged in the warehousing business in Chicago, free from any claim of right or contract under an act of incorporation of any state whatever, and free from the question of continuous transportation through several states. And in that case the court was presented with the question, which it decided, whether any one engaged in a public business, in which all the public had a right to require

his service, could be regulated by acts of the legislature in the exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services."

In Dow v. Beidelman, 125 U. S. 680, 686, 8 Sup. Ct. Rep. 1028, it was said by Mr. Justice GRAY, in delivering the opinion of the court, that in Munn v. Illinois the court, after affirming the doctrine that by the common law carriers or other persons exercising a public employment could not charge more than a reasonable compensation for their services, and that it is within the power of the legislature "to declare what shall be a reasonable compensation for such services, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable," said that to limit the rate of charges for services rendered in the public employment, or for the use of property in which the public has an interest, was only changing a regulation which existed before, and established no new principle in the law, but only gave a new effect to an old one.

In Railroad Co. v. Minnesota, 134 U. S. 418, 461, 10 Sup. Ct. Rep. 462, it was said by Mr. Justice BRADLEY, in his dissenting opinion, in which Mr. Justice GRAY and Mr. Justice LAMAR concurred, that the decision of the court in that case practically overruled Munn v. Illinois; but the opinion of the court did not say so, nor did it refer to Munn v. Illinois; and we are of opinion that the decision in the case in 134 U. S., 10 Sup. Ct. Rep., is, as will be hereafter shown, quite distinguishable from the present cases.

It is thus apparent that this court has adhered to the decision in Munn v. Illinois, and to the doctrines announced in the opinion of the court in that case; and those doctrines have since been repeatedly enforced in the decisions of the courts of the states.

In Lake Shore, etc., Ry. v. Cincinnati, S. & C. Ry., 30 Ohio St. 604, 616, in 1877, it was said, citing Munn v. Illinois: "When the owner of property devotes it to a public use, he, in effect, grants to the public an interest in such use, and must, to the extent of the use, submit to be controlled by the public, for the common good, as long as he maintains the use." That was a decision by the supreme court commission of Ohio.

In State v. Gas Co., 34 Ohio St. 572, 582, in 1878, Munn v. Illinois was cited with approval, as holding that where the owner of property devotes it to a use in which the public have an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, so long as he maintains the use; and the court added that in Munn v Illinois the principle was applied to warehousemen engaged in receiving and storing grain; that it was held that their rates of charges were subject to legislative regulation; and that the principle applied with greater force to corporations when they were invested with franchises to be exercised to subserve the public interest.

The supreme court of Illinois, in Ruggles v. People, 91 Ill. 256, 262, in 1878, cited Munn v. People, 69 Ill. 80, which was affirmed in Munn v. Illinois, as holding that it was competent for the general assembly to fix the maximum charges by individuals keeping public warehouses for storing, handling, and shipping grain, and that, too, when such persons had derived no special privileges from the state, but were, as citizens of the state, exercising the business of storing and handling grain for individuals.

The supreme court of Alabama, in Davis v. State, 68 Ala. 58, in 1880 held that a statute declaring it unlawful, within certain counties, to transport or move, after sunset and before sunrise of the succeeding day, any cotton in the seed, but permitting the owner or purchaser to remove it from the field to a place of storage, was not unconstitutional. Against the argument that the statute was such a despotic interference with the rights of private property as to be tantamount, in its practical effect, to a deprivation of ownership "without due process of law," the court said that the statute sought only to regulate and control the transportation of cotton in one particular condition of it, and was a mere police regulation, to which there was no constitutional objection; citing Munn v. Illinois. It added that the object of the statute was to regulate traffic in the staple agricultural product of the state, so as to prevent a prevalent evil, which, in the opinion of the law-making power, might do much to demoralize agricultural labor, and to destroy the legitimate profits of agricultural pursuits, to the public detriment, at least within the specified territory.

In Baker v. State, 54 Wis. 368, 373, 12 N. W. Rep. 12, in 1882, Munn v. Illinois was cited with approval by the supreme court of Wisconsin, as holding that the legislature of Illinois had power to regulate public warehouses, and the warehousing and inspection of grain within that state, and to enforce its regulations by penalties, and that such legislation was not in conflict with any provision of the federal constitution.

The court of appeals of Kentucky, in 1882, in Nash v. Page, 80 Ky. 539, 545, cited Munn v. Illinois, as applicable to the case of the proprietors of tobacco warehouses in the city of Louisville, and held that the character of the business of the tobacco warehousemen was that of a public employment, such as made them subject, in their charges and their mode of conducting business, to legislative regulation and control, as having a practical monopoly of the sales of tobacco at auction.

In 1884, the supreme court of Pennsylvania, in Girard Storage Co. v. Southwark Co., 105 Pa. St. 248, 252, cited Munn v. Illinois as involving the rights of a private person, and said that the principle involved in the ruling of this court was that, where the owner of such property, as a warehouse, devoted it to a use in which the public had an interest, he in effect granted to the public an interest in such use, and must, therefore, to the extent thereof, submit to be controlled by

the public for the common good, as long as he maintained that use.

In Sawyer v. Davis, 136 Mass. 239, in 1884, the supreme judicial court of Massachusetts said that nothing is better established than the power of the legislature to make what are called police regulations, declaring in what manner property shall be used and enjoyed and business carried on, with a view to the good order and benefit of the community, even though they may interfere to some extent with the full enjoyment of private property, and although no compensation is given to a person so inconvenienced; and Munn v. Illinois was cited as holding that the rules of the common law which had from time to time been established, declaring or limiting the right to use or enjoy property, might themselves be changed, as occasion might require.

The supreme court of Indiana, in 1885, in Brechbill v. Randall, 102 Ind. 528, 1 N. E. Rep. 362, held that a statute was valid which required persons selling patent-rights to file with the clerk of the county a copy of the patent, with an affidavit of genuineness and authority to sell, on the ground that the state had power to make police regulations for the protection of its citizens against fraud and imposition; and the court cited Munn v. Illinois as authority.

The supreme court of Nebraska, in 1885, in Webster Telephone Case, 17 Neb. 126, 22 N. W. Rep. 237, held that when a corporation or person assumed and undertook to supply a public demand, made necessary by the requirements of the commerce of the country, such as a public telephone, such demand must be supplied to all alike, without discrimination; and Munn v. Illinois was cited by the prevailing party and by the court. The defendant was a corporation, and had assumed to act in a capacity which was to a great extent public, and had undertaken to satisfy a public want or necessity, although it did not possess any special privileges by statute or any monopoly of business in a given territory; yet it was held that, from the very nature and character of its business, it had a monopoly of the business which it transacted. The court said that no statute had been deemed necessary to aid the courts in holding that where a person or company undertook to supply a public demand, which was "affected with a public interest," it must supply all alike who occupied a like situation, and not discriminate in favor of or against any.

In Stone v. Railroad Co., 62 Miss. 607, 639, the supreme court of Mississippi, in 1885, cited Munn v. Illinois as deciding that the regulation of warehouses for the storage of grain, owned by private individuals, and situated in Illinois, was a thing of domestic concern, and pertained to the state, and as affirming the right of the state to regulate the business of one engaged in a public employment therein, although that business consisted in storing and transferring immense quantities of grain in its transit from the fields of production to the markets of the world.

In Hockett v. State, 105 Ind. 250, 258, 5 N. E. Rep. 178, in 1885, the supreme court of Indiana held that a statute of the state which prescribed the maximum price which a telephone company should charge for the use of its telephones was constitutional, and that in legal contemplation all the instruments and appliances used by a telephone company in the transaction of its business were devoted to a public use, and the property thus devoted became a legitimate subject of legislative regulation. It cited Munn v. Illinois as a leading case in support of that proposition, and said that, although that case had been the subject of comment and criticism, its authority as a precedent remained unshaken. This doctrine was confirmed in Telephone Co. v. Bradbury, 106 Ind. 1, 5 N. E. Rep. 721, in the same year, and in Telephone Co. v. State, 118 Ind. 194, 207, 19 N. E. Rep. 604, in 1888, in which latter case Munn v. Illinois was cited by the court.

In Chesapeake & P. Tel. Co. v. Baltimore & O. Tel. Co., 66 Md. 399, 414, 7 Atl. Rep. 809, in 1886, it was held that the telegraph and the telephone were public vehicles of intelligence, and those who owned or controlled them could no more refuse to perform impartially the functions which they had assumed to discharge than a railway company, as a common carrier, could rightfully refuse to perform its duty to the public; and that the legislature of the state had full power to regulate the services of telephone companies, as to the parties to whom facilities should be furnished. The court cited Munn v. Illinois, and said that it could no longer be controverted that the legislature of a state had full power to regulate and control, at least within reasonable limits, public employments and property used in connection therewith; that the operation of the telegraph and the telephone in doing a general business was a public employment, and the instruments and appliances used were property devoted to a public use, and in which the public had an interest; and that, such being the case, the owner of the property thus devoted to public use must submit to have that use and employment regulated by public authority for the common good.

In the court of chancery of New Jersey, in 1889, in Delaware, etc., R. R. Co. v. Central Stock-Yard Co., 45 N. J. Eq. 50, 60, 17 Atl. Rep. 146, it was held that the legislature had power to declare what services warehousemen should render to the public, and to fix the compensation that might be demanded for such services; and the court cited Munn v. Illinois as properly holding that warehouses for the storage of grain must be regarded as so far public in their nature as to be subject to legislative control, and that, when a citizen devoted his property to a use in which the public had an interest, he in effect granted to the public an interest in that use, and rendered himself subject to control in that use by the body politic.

In Zanesville v. Gas-Light Co., 47 Ohio St. 1, 23 N. E. Rep. 55, in 1889, it was said by the supreme court of Ohio that the principle was well established that, where the owner of property devotes it to a use in which the public have an interest, he in effect grants to the public an interest in

such use, and must to the extent of that interest submit to be controlled by the public for the common good, as long as he maintains the use, and that such was the point of the decision in Munn v. Illinois.

We must regard the principle maintained in Munn v. Illinois as firmly established; and we think it covers the present cases, in respect to the charge for elevating, receiving, weighing, and discharging the grain, as well as in respect to the charge for trimming and shoveling to the leg of the elevator when loading, and trimming the cargo when loaded. If the shovelers or scoopers chose, they might do the shoveling by hand, or might use a steam-shovel. A steam-shovel is owned by the elevator owner, and the power for operating it is furnished by the engine of the elevator; and if the scooper uses the steam-shovel, he pays the elevator owner for the use of it.

The answer to the suggestion that by the statute the elevator owner is forbidden to make any profit from the business of shoveling to the leg of the elevator is that made by the court of appeals of New York in the Case of Budd, that the words "actual cost," used in the statute, were intended to exclude any charge by the elevator owner beyond the sum specified for the use of his machinery in shoveling, and the ordinary expenses of operating it, and to confine the charge to the actual cost of the outside labor required for trimming and bringing the grain to the leg of the elevator; and that the purpose of the statute could be easily evaded and defeated if the elevator owner was permitted to separate the services, and to charge for the use of his steam-shovel any sum which might be agreed upon between himself and the shovelers' union, and thereby, under color of charging for the use of his steam-shovel, to exact of the carrier a sum for elevating beyond the rate fixed by the statute.

We are of opinion that the act of the legislature of New York is not contrary to the fourteenth amendment to the constitution of the United States, and does not deprive the citizen of his property without due process of law; that the act, in fixing the maximum charges which it specifies, is not unconstitutional, nor is it so in limiting the charge for shoveling to the actual cost thereof; and that it is a proper exercise of the police power of the state.

On the testimony in the cases before us, the business of elevating grain is a business charged with a public interest, and those who carry it on occupy a relation to the community analogous to that of common carriers. The elevator owner, in fact, retains the grain in his custody for an appreciable period of time, because he receives it into his custody, weighs it, and then discharges it, and his employment is thus analogous to that of a warehouseman. In the actual state of the business the passage of the grain to the city of New York and other places on the seaboard would, without the use of elevators, be practically impossible. The elevator at Buffalo is a link in the chain of transportation to the seaboard, and the elevator in the harbor of New York is a like link in the transportation abroad by sea. The charges made by the elevator influence the price of grain at the point of destination on the seaboard, and that influence extends to the prices of grain at the places abroad to which it goes. The elevator is devoted by its owner, who engages in the business, to a use in which the public has an interest, and he must submit to be controlled by public legislation for the common good.

It is contended in the briefs for the plaintiffs in error in the Annan and Pinto Cases that the business of the relators in handling grain was wholly private, and not subject to regulation by law; and that they had received from the state no charter, no privileges, and no immunity, and stood before the law on a footing with the laborers they employed to shovel grain, and were no more subject to regulation than any other individual in the community. But these same facts existed in Munn v. Illinois. In that case, the parties offending were private individuals, doing a private business, without any privilege or monopoly granted to them by the state. Not only is the business of elevating grain affected with a public interest, but the records show that it is an actual monopoly, besides being incident to the business of transportation and to that of a common carrier, and thus of a *quasi* public character. The act is also constitutional as an exercise of the police power of the state.

So far as the statute in question is a regulation of commerce, it is a regulation of commerce only on the waters of the state of New York. It operates only within the limits of that state, and is no more obnoxious as a regulation of interstate commerce than was the statute of Illinois in respect to warehouses, in Munn v. Illinois. It is of the same character with navigation laws in respect to navigation within the state, and laws regulating wharfage rates within the state, and other kindred laws.

It is further contended that, under the decision of this court in Railway Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. Rep. 462, the fixing of elevator charges is a judicial question, as to whether they are reasonable or not; that the statute must permit and provide for a judicial settlement of the charges; and that, by the statute under consideration, an arbitrary rate is fixed, and all inquiry is precluded as to whether that rate is reasonable or not.

But this is a misapprehension of the decision of this court in the case referred to. In that case the legislature of Minnesota had passed an act which established a railroad and warehouse commission, and the supreme court of that state had interpreted the act as providing that the rates of charges for the transportation of property by railroads, recommended and published by the commission, should be final and conclusive as to what were equal and reasonable charges, and that there could be no judicial inquiry as to the reasonableness of such rates. A railroad company, in answer to an application for a *mandamus*, contended that such rates in

regard to it were unreasonable, and, as it was not allowed by the state court to put in testimony in support of its answer, on the question of the reasonableness of such rates, this court held that the statute was in conflict with the constitution of the United States, as depriving the company of its property without due process of law, and depriving it of the equal protection of the laws. That was a very different case from one under the statute of New York in question here, for in this instance the rate of charges is fixed directly by the legislature. See Spencer v. Merchant, 125 U. S. 345, 356, 8 Sup. Ct. Rep. 921. What was said in the opinion of the court in 134 U. S., 10 Sup. Ct. Rep., had reference only to the case then before the court, and to charges fixed by a commission appointed under an act of the legislature, under a constitution of the state which provided that all corporations, being common carriers, should be bound to carry "on equal and reasonable terms," and under a statute which provided that all charges made by a common carrier for the transportation of passengers or property should be "equal and reasonable."

What was said in the opinion in 134 U. S., 10 Sup. Ct. Rep., as to the question of the reasonableness of the rate of charge being one for judicial investigation, had no reference to a case where the rates are prescribed directly by the legislature. Not only was that the case in the statute of Illinois in Munn v. Illinois, but the doctrine was laid down by this court in Railway Co. v. Illinois, 118 U. S. 557, 568, 7 Sup. Ct. Rep. 4, that it was the right of a state to establish limitations upon the power of railroad companies to fix the price at which they would carry passengers and freight, and that the question was of the same character as that involved in fixing the charges to be made by persons engaged in the warehousing business. So, too, in Dow v. Beidleman, 125 U. S. 680, 686, 8 Sup. Ct. Rep. 1028, it was said that it was within the power of the legislature to declare what should be a reasonable compensation for the services of persons exercising a public employment, or to fix a maximum beyond which any charge made would be unreasonable.

But in Dow v. Beidleman, after citing Munn v. Illinois, 94 U. S. 113; Railroad Co. v. Iowa, Id. 155, 161, 162; Peik v. Railway, Id. 164, 178; Railroad v. Ackley, Id. 179; Railroad v. Blake, Id. 180; Stone v. Wisconsin, Id. 181; Ruggles v. Illinois, 108 U. S. 526, 2 Sup. Ct. Rep. 832; Railroad Co. v. Illinois, 108 U. S. 541, 2 Sup. Ct. Rep. 839; Stone v. Trust Co., 116 U. S. 307, 6 Sup. Ct. Rep. 334, 388, 1191; Stone v. Illinois Cent. R. Co., 116 U. S. 347, 6 Sup. Ct. Rep. 348, 388, 1191, and Stone v. New Orleans & N. E. R. Co., 116 U. S. 352, 6 Sup. Ct. Rep. 349, 391, —as recognizing the doctrine that the legislature may itself fix a maximum, beyond which any charge would be unreasonable, in respect to services rendered in a public employment, or for the use of property in which the public has an interest, subject to the proviso that such power of limitation or regulation is not without limit, and is not a power to destroy, or a power to compel the doing of the services without reward, or to take private property for public use without just compensation or without due process of law, the court said that it had no means, "if it would under any circumstances have the power," of determining that the rate fixed by the legislature in that case was unreasonable, and that it did not appear that there had been any such confiscation of property as amounted to a taking of it without due process of law, or that there had been any denial of the equal protection of the laws.

In the cases before us, the records do not show that the charges fixed by the statute are unreasonable, or that property has been taken without due process of law, or that there has been any denial of the equal protection of the laws; even if under any circumstances we could determine that the maximum rate fixed by the legislature was unreasonable.

In Banking Co. v. Smith, 128 U. S. 174, 179, 9 Sup. Ct. Rep. 47, in the opinion of the court, delivered by Mr. Justice FIELD, it was said that this court had adjudged in numerous instances that the legislature of a state had the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any contract to the contrary, subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation, and that what is done does not amount to a regulation of foreign or interstate commerce.

It is further contended for the plaintiffs in error that the statute in question violates the fourteenth amendment, because it takes from the elevator owners the equal protection of the laws, in that it applies only to places which have 130,000 population, or more, and does not apply to places which have less than 130,000 population, and thus operates against elevator owners in the larger cities of the state. The law operates equally on all elevator owners in places having 130,000 population, or more; and we do not perceive how they are deprived of the equal protection of the laws, within the meaning of the fourteenth amendment.

Judgments affirmed.

Mr. Justice BREWER, Mr. Justice FIELD, and Mr. Justice BROWN dissent.

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CHICAGO, M. & ST. P. RY. CO. v. STATE OF MINNESOTA ex rel. RAILROAD & WAREHOUSE COMMISSION.[1]

(10 Sup. Ct. 462, 702, 134 U. S. 418.)

Supreme Court of the United States. March 24, 1890.

John W. Cary and *W. C. Goudy*, for plaintiff in error. *Moses E. Clapp*, for defendant in error.

BLATCHFORD, J. This is a writ of error to review a judgment of the supreme court of the state of Minnesota, awarding a writ of *mandamus* against the Chicago, Milwaukee & St. Paul Railway Company. The case arose on proceedings taken by the railroad and warehouse commission of the state of Minnesota, under an act of the legislature of that state approved March 7, 1887, (Gen. Laws 1887, c. 10,) entitled "An act to regulate common carriers, and creating the railroad and warehouse commission of the state of Minnesota, and defining the duties of such commission in relation to common carriers." The act is set forth in full in the margin.[2] The ninth section of that act creates a commission, to be known as the "Railroad and Warehouse Commission of the State of Minnesota," to consist of three persons, to be appointed by the governor by and with the advice and consent of the senate. The first section of the act declares that its provisions shall apply to any common carrier "engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management, or arrangement, for a carriage or shipment from one place or station to another, both being within the state of Minnesota." The second section declares "that all charges made by any common carrier subject to the provisions of this act, for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be equal and reasonable; and every unequal and unreasonable charge for such service is prohibited, and declared to be unlawful." The eighth section provides that every common carrier subject to the provisions of the act shall print and keep for public inspection schedules of the charges which it has established for the transportation of property; that it shall make no change therein except after 10 days' public notice, plainly stating the changes proposed to be made, and the time when they will go into effect; that it shall be unlawful for it to charge or receive any greater or less compensation than that so established and published for transporting property; that it shall file copies of its schedules with the commission, and shall notify such commission of all changes proposed to be made; that, in case the commission shall find at any time that any part of the tariffs of charges so filed and published is in any respect unequal or unreasonable, it shall have the power, and it is authorized and directed, to compel any common carrier to change the same, and adopt such charge as the commission "shall declare to be equal and reasonable," to which end the commission shall, in writing, inform such carrier in what respect such tariff of charges is unequal and unreasonable, and shall recommend what tariff shall be substituted therefor; that, in case the carrier shall neglect for 10 days after such notice to adopt such tariff of charges as the commission recommends, it shall be the duty of the latter to immediately publish such tariff as it has declared to be equal and reasonable, and cause it to be posted at all the regular stations on the line of such carrier in Minnesota, and it shall be unlawful thereafter for the carrier to charge a higher or lower rate than that so fixed and published by the commission; and that, if any carrier subject to the provisions of the act shall neglect to publish or file its schedules of charges, or to carry out such recommendation made and published by the commission it shall be subject to a writ of *mandamus* "to be issued by any judge of the supreme court or of any of the district courts" of the state, on application of the commission, to compel compliance with the requirements of section 8, and with the recommendation of the commission, and a failure to comply with the requirements of the *mandamus* shall be punishable as and for contempt, and the commission may apply also to any such judge for an injunction against the carrier from receiving or transporting property or passengers within the state, until it shall have complied with the requirements of section 8, and with the recommendation of the commission, and for any willful violation or failure to comply with such requirements or such recommendation of the commission, the court may award such costs, including counsel fees, by way of penalty, on the return of said writs, and after due deliberation thereon, as may be just.

On the 22d of June, 1887, the Boards of Trade Union of Farmington, Northfield, Faribault, and Owatonna, in Minnesota, filed with the commission a petition in writing, complaining that the Chicago, Milwaukee & St. Paul Railway Company, being a common carrier engaged in the transportation of property wholly by railroad, for carriage or shipment from Owatonna, Faribault, Dundas, Northfield, and Farmington to the cities of St. Paul and Minneapolis, all of those places being within the state of Minnesota, made charges for its services in the transportation of milk from said Owatonna, Faribault, Dundas, Northfield, and Farmington to St. Paul and Minneapolis which were unequal and unreasonable, in that it charged 4 cents per gallon for the transportation of milk from Owatonna to St. Paul and Minneapolis, and 3 cents per gallon from Faribault, Dundas, Northfield, and Farmington to the said cities; and that such charges were unreasonably high, and subjected the traffic in milk between said points to unreasonable prejudice and disadvantage. The prayer of the petition

[1] Reversing 37 N. W. Rep. 782.

[2] See note at end of case.

was that such rates be declared unreasonable, and the carrier be compelled to change the same, and adopt such rates and charges as the commission should declare to be equal and reasonable. A statement of the complaint thus made was forwarded by the commission on the 29th of June, 1887, to the railway company; and it was called upon by the commission, on the 6th of July, 1887, to satisfy the complaint, or answer it in writing, at the office of the commission in St. Paul, on the 13th of July, 1887. On the 30th of June, 1887, Mr. J. F. Tucker, the assistant general manager of the railway company, addressed a letter from Milwaukee to the secretary of the commission, saying: "I have your favor of the 29th, with complaint as to milk rates being unreasonable and unequal. They may be unequal, if unreasonable. They are unreasonably low for the service performed,—by passenger train,—and are 25 per cent. less than the same commodity is charged into New York, with longer distances and hundred times larger volume in favor of New York. I am frank to say it is hard to appreciate complaints from boards of trade that 1-10 of a cent per gallon on milk handled on passenger train one mile is unreasonable. With what is the comparison made that enables such a conclusion? It's not first-class rates by freight train and was made low to encourage the trade, under the hope and promise that, when the trade were fostered, it would be advanced. This, as usual, has been forgotten." On the 13th of July, 1887, at the office of the commission in St. Paul, the company appeared by J. A. Chandler, its duly-authorized attorney, and the Boards of Trade Union by its attorney, and the commission proceeded to investigate the complaint. An investigation of the rates charged by the company for its services in transporting milk from Owatonna, Faribault, Dundas, Northfield, and Farmington, to St. Paul and Minneapolis, was made by the commission, and it found that the charges of the company for transporting milk from Owatonna and Faribault to St. Paul and Minneapolis was 3 cents per gallon in 10-gallon cans; that such charges were unequal and unreasonable; and that the company's tariff of rates for transporting milk from Owatonna and Faribault to those cities, filed and published by it as provided by chapter 10 of the Laws of 1887, was unequal and unreasonable; and the commission declared that a rate of 2½ cents per gallon in 10-gallon cans was an equal and reasonable rate for such services. On the 4th of August, 1887, the commission made a report in writing which included the findings of fact upon which its conclusions were based, its recommendation as to the tariff which should be substituted for the tariff so found to be unequal and unreasonable, and also a specification of the rates and charges which it declared to be equal and reasonable. This paper was in the shape of a communication dated at St. Paul, August 4, 1887, signed by the secretary of the commission, and addressed to the company. It said: "It appearing, from your schedule of rates and charges for the transportation of milk over and upon the Iowa and Minnesota division of your road, that you charge, collect, and receive for the transportation of milk over and upon said line from Owatonna and Faribault to the cities of St. Paul and Minneapolis three cents per gallon, in ten-gallon cans, and from Dundas, Northfield, and Farmington to said cities of St. Paul and Minneapolis two and one-half cents per gallon, in cans of like capacity, and complaint having been made that such rates and charges are unequal and unreasonable, and that the services performed by you in such transportation are not reasonably worth the said sums charged therefor, and this commission having thereupon, pursuant to the provisions of section eight of an act entitled 'An act to regulate common carriers, and creating the railroad and warehouse commission of the state of Minnesota, and defining the duties of such commission in relation to common carriers,' approved March 7, 1887, examined the cause and reasonableness of said complaint, and finding, pursuant to subdivision *e* of said section, that your said tariff of rates, so far as appertains to the transportation of milk to the cities of St. Paul and Minneapolis from the other places above named, and inasmuch as said tariff provides for, or requires the charging or collection of, a greater compensation than two and one-half cents per gallon, is unreasonable and excessive: therefore said commission recommends and directs that you, the said Chicago, Milwaukee & St. Paul Railway Company, shall alter and change your said schedule by the adoption and substitution of a rate not to exceed two and one-half cents per gallon for the services aforesaid from the cities of Owatonna and Faribault, or either of them, to said St. Paul and Minneapolis. The commission, as at present advised, approves of the custom and arrangement which, it is informed, has been adopted and is now in use by the Minnesota & Northwestern R. R. Co., of collecting two and one-half cents per gallon on all milk transported by it, regardless of distance; but this expression of opinion is no part of the decision, notice, or order in this case." This report was entered of record, and a copy furnished to the Boards of Trade Union, and a copy was also delivered, on the 4th of August, 1887, to the company, with a notice to it to desist from charging or receiving such unequal and unreasonable rates for such services. The commission thus informed the company in writing in what respect such tariff of rates and charges was unequal and unreasonable, and recommended to it in writing what tariff should be substituted therefor, to-wit, the tariff so found equal and reasonable by the commission. The company neglected and refused, for more than 10 days after such notice, to substitute or adopt such tariff of charges as was recommended by the commission. The latter thereupon published the tariff of charges which it had declared to be equal and reasonable, and caused it to be posted at the station of the company in Faribault on the 14th of October, 1887, and at all the regular stations on the line of the company in Minnesota prior to November 12, 1887, and in all things complied with the statute. The tariff so made, pub-

lished, and posted was dated October 13, 1887, and was headed: "Chicago, Milwaukee & St. Paul Railway Company. (Iowa and Minnesota Division.) Freight tariff on Milk from Owatonna and Faribault to St. Paul and Minneapolis, taking effect October 15, 1887."—and prescribed a charge of 2½ cents per gallon in 10-gallon cans from either the Owatonna station or the Faribault station to either St. Paul or Minneapolis, to be the legal, equal, and reasonable maximum charge and compensation for such service, and declared that the same was in force and effect in lieu and place of the charges and compensation theretofore demanded and received therefor by the company.

On the 6th of December, 1887, the commission, by the attorney general of the state, made an application to the supreme court of the state for a writ of *mandamus* to compel the company to comply with the recommendation made to it by the commission, to change its tariff of rates on milk from Owatonna and Faribault to St. Paul and Minneapolis, and to adopt the rates declared by the commission to be equal and reasonable. The application set forth the proceedings hereinbefore detailed; that the company had refused to carry out the recommendation so made, published, and posted by the commission; that it continued to charge 3 cents per gallon for the transportation of milk in 10-gallon cans from Owatonna and Faribault to St. Paul and Minneapolis; that said charge was unequal, unreasonable, and excessive; that 2½ cents per gallon for the transportation by it of milk in 10-gallon cans from Owatonna and Faribault to St. Paul and Minneapolis was the maximum reasonable charge for the service; that any rate therefor in excess of 2½ cents per gallon in 10-gallon cans was unequal, unreasonable, and excessive; that 3 cents per gallon in 10-gallon cans was a higher rate than was charged for the same distances on passenger trains by any express company or by any other railroad company in Minnesota engaged in transporting milk to St. Paul or Minneapolis; that 2½ cents per gallon in 10-gallon cans was the highest rate charged for like distances on passenger trains by any such company; that the milk transported by the company to St. Paul and Minneapolis, over its Iowa and Minnesota division, (extending from Calmar, in Iowa, to Le Roy, in Minnesota, and from Le Roy, through Owatonna and Faribault, to St. Paul and Minneapolis,) large quantities of which milk were shipped from Faribault, was so transported by the company on a passenger train which ran daily from Owatonna to St. Paul and Minneapolis; and that the company, by means of such excessive charges, subjected the traffic in milk at Faribault and Owatonna to undue and unreasonable prejudice and disadvantage. Thereupon an alternative writ of *mandamus* was issued by the court, returnable before it on the 14th of December, 1887. On the 23d of December, 1887, the company filed its return to the alternative writ in which it set up: (1) That it was not competent for the legislature of Minnesota to delegate to a commission a power of fixing rates for transportation, and that the act of March 7, 1887, so far as it attempted to confer upon the commission power to establish rates for the transportation of freight and passengers, was void under the constitution of the state. (2) That the company as the owner of its railroad, franchises, equipment, and appurtenances, and entitled to the possession and beneficial use thereof, was authorized to establish rates for the transportation of freight and passengers, subject only to the provision that such rates should be fair and reasonable; that the establishing of such rates by the state against the will of the company was *pro tanto* a taking of its property, and depriving it thereof, without due process of law, in violation of section 1 of article 14 of the amendments to the constitution of the United States; and that the making of the order of October 13, 1887, was *pro tanto* a taking and depriving the company of its property without due process of law, in violation of said section 1, and therefore void and of no effect. (3) That the rate of 3 cents per gallon as a freight for carrying milk in 10-gallon cans on passenger trains from Owatonna and Faribault, respectively, to St. Paul and Minneapolis, was a reasonable, fair, and just rate; that the rate of 2½ cents per gallon, in 10-gallon cans, so fixed and established by the commission, was not a reasonable, fair, or just compensation to the company for the service rendered; and that the establishing of such rate by the commission against the will of the company was *pro tanto* a taking of its property without due process of law, in violation of said section 1. The case came on for hearing upon the alternative writ, and the return, and the company applied for a reference to take testimony on the issue raised by the allegations in the application for the writ and the return thereto, as to whether the rate fixed by the commission was reasonable, fair, and just. The court denied the application for a reference, and rendered judgment in favor of the relator, and that a peremptory writ of *mandamus* issue. An application for a reargument was made and denied. The terms of the peremptory writ were directed to be that the company comply with the requirements of the recommendation and order made by the commission on the 4th of August, 1887, and change its tariff of rates and charges for the transportation of milk from Owatonna and Faribault to St. Paul and Minneapolis, and substitute therefor the tariff recommended, published, and posted by the commission, to-wit, the rate of 2½ cents per gallon of milk in 10-gallon cans from Owatonna and Faribault to St. Paul and Minneapolis, being the rates published by the commission, and declared to be equal and reasonable therefor. Costs were also adjudged against the company. To review this judgment the company has brought a writ of error.

The opinion of the supreme court is reported in 38 Minn. 281, 37 N. W. Rep. 782. In it the court, in the first place, construed the statute on the question as to whether the court itself had jurisdiction to entertain the proceeding, and held that it had. Of course, we cannot review this decision.

It next proceeded to consider the question as to the nature and extent of the powers granted to the commission by the statute in the matter of fixing the rates of charges. On that subject it said: "It seems to us that, if language means anything, it is perfectly evident that the expressed intention of the legislature is that the rates recommended and published by the commission, assuming that they have proceeded in the manner pointed out by the act, should be not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are lawful or equal and reasonable charges; that, in proceedings to compel compliance with the rates thus published, the law neither contemplates nor allows any issue to be made or inquiry had as to their equality and reasonableness in fact. Under the provisions of the act, the rates thus published are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable; and hence, in proceedings like the present, there is, as said before, no fact to traverse, except the violation of the law in refusing compliance with the recommendations of the commission. Indeed, the language of the act is so plain on that point that argument can add nothing to its force." It then proceeded to examine the question of the validity of the act under the constitution of Minnesota, as to whether the legislature was authorized to confer upon the commission the powers given to the latter by the statute. It held that, as the legislature had the power itself to regulate charges by railroads, it could delegate to a commission the power of fixing such charges, and could make the judgment or determination of the commission as to what were reasonable charges final and conclusive.

The Chicago, Milwaukee & St. Paul Railway Company is a corporation organized under the laws of Wisconsin. The line of railroad owned and operated by it in the present case extends from Calmar, in Iowa, to Le Roy, in Minnesota, and from Le Roy, through Owatonna and Faribault, to St. Paul and Minneapolis; the line from Calmar to St. Paul and Minneapolis being known as the "Iowa and Minnesota Division," and being wholly in Minnesota from the point where it crosses the state line between Iowa and Minnesota. It was constructed under a charter granted by the territory of Minnesota to the Minneapolis & Cedar Valley Railroad Company, by an act approved March 1, 1856, (Laws 1856, c. 163, p. 325,) to construct a railroad from the Iowa line, at or near the crossing of said line by the Cedar river, through the valley of Strait river to Minneapolis. Section 9 of that act provided that the directors of the corporation should have power to make all needful rules, regulations, and by-laws touching "the rates of toll, and the manner of collecting the same;" and section 13, that the company should have power to unite its railroad with any other railroad which was then, or thereafter might be, constructed in the territory of Minnesota, or adjoining states or territories, and should have power to consolidate its stock with any other company or companies. By an act passed March 3, 1857, c. 99, (11 St. 195,) the congress of the United States made a grant of land to the territory of Minnesota, to aid in constructing certain railroads. By an act of the legislature of the territory approved May 22, 1857, (Laws 1857, Extra Sess. 20,) a portion of such grant was conferred upon the Minneapolis & Cedar Valley Railroad Company. Subsequently, in 1860, the state of Minnesota, by proper proceedings, became the owner of the rights, franchises, and property of that company. By an act approved March 10, 1862, c. 17, (Sp. Laws 1862, p. 226,) the state incorporated the Minneapolis, Faribault & Cedar Valley Railroad Company, and conveyed to it all the franchises and property of the Minneapolis & Cedar Valley Railroad Company which the state had so acquired; and, by an act approved February 1, 1864, (Sp. Laws 1864, p. 164,) the name of the Minneapolis, Faribault & Cedar Valley Railroad Company was changed to that of the Minnesota Central Railway Company. That company constructed the road from Minneapolis and St. Paul to Le Roy, in Minnesota; and the road from Le Roy to Calmar, in Iowa, and thence to McGregor, in the latter state, was consolidated with it. In August, 1867, the entire road from McGregor, by way of Calmar, Le Roy, Austin, Owatonna, and Faribault, to St. Paul and Minneapolis, was conveyed to the Chicago, Milwaukee & St. Paul Railway Company, which succeeded to all the franchises so granted to the Minneapolis & Cedar Valley Railroad Company.

It is contended for the railway company that the state of Minnesota is bound by the contract made by the territory in the charter granted to the Minneapolis & Cedar Valley Railroad Company; that a contract existed that the company should have the power of regulating its rates of toll; that any legislation by the state infringing upon that right impairs the obligation of the contract; that there was no provision in the charter or in any general statute reserving to the territory or to the state the right to alter or amend the charter; and that no subsequent legislation of the territory or of the state could deprive the directors of the company of the power to fix its rates of toll, subject only to the general provision of law that such rates should be reasonable. But we are of opinion that the general language of the ninth section of the charter of the Minneapolis & Cedar Valley Railroad Company cannot be held to constitute an irrepealable contract with that company that it should have the right for all future time to prescribe its rates of toll, free from all control by the legislature of the state. It was held by this court in Railroad Co. v. Miller, 132 U. S. 75, 10 Sup. Ct. 34, in accordance with a long course of decisions both in the state courts and in this court, that a railroad corporation takes its charter, containing a kindred provision with that in question, subject to the general law of the state, and to such changes as may be made in such general law, and subject to future constitutional provisions and future general legislation, in the absence of any prior contract with it exempting it from liability to such future general legislation in respect of the subject-matter

involved; and that exemption from future general legislation, either by a constitutional provision or by an act of the legislature, cannot be admitted to exist unless it is given expressly, or unless it follows by an implication equally clear, with express words. There is nothing in the mere grant of power, by section 9 of the charter, to the directors of the company, to make needful rules and regulations touching the rates of toll and the manner of collecting the same, which can be properly interpreted as authorizing us to hold that the state parted with its general authority itself to regulate, at any time in the future when it might see fit to do so, the rates of toll to be collected by the company. In Stone v. Trust Co., 116 U. S. 307, 325, 6 Sup. Ct. Rep. 334, 388, 1191, the whole subject is fully considered, the authorities are cited, and the conclusion is arrived at that the right of a state reasonably to limit the amount of charges by a railroad company for the transportation of persons and property within its jurisdiction cannot be granted away by its legislature unless by words of positive grant, or words equivalent in law; and that a statute which grants to a railroad company the right, "from time to time, to fix, regulate, and receive the tolls and charges by them to be received for transportation," does not deprive the state of its power, within the limits of its general authority, as controlled by the constitution of the United States, to act upon the reasonableness of the tolls and charges so fixed and regulated. But, after reaching this conclusion, the court said, (116 U. S. 331, 6 Sup. Ct. Rep. 345:) "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law." There being, therefore, no contract or chartered right in the railroad company which can prevent the legislature from regulating in some form the charges of the company for transportation, the question is whether the form adopted in the present case is valid.

The construction put upon the statute by the supreme court of Minnesota must be accepted by this court, for the purposes of the present case, as conclusive, and not to be re-examined here as to its propriety or accuracy. The supreme court authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the commission are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable; and that, in a proceeding for a *mandamus* under the statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable. This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the constitution of United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions, or possessing the machinery of a court of justice. Under section 8 of the statute, which the supreme court of Minnesota says is the only one which relates to the matter of the fixing by the commission of general schedules of rates, and which section, it says, fully and exclusively provides for that subject, and is complete in itself, all that the commission is required to do is, on the filing with it by a railroad company of copies of its schedules of charges, to "find" that any part thereof is in any respect unequal or unreasonable, and then it is authorized and directed to compel the company to change the same, and adopt such charge as the commission "shall declare to be equal and reasonable;" and to that end it is required to inform the company in writing in what respect its charges are unequal and unreasonable. No hearing is provided for; no summons or notice to the company before the commission has found what it is to find, and declared what it is to declare; no opportunity provided for the company to introduce witnesses before the commission,—in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the commission, the company appeared before it by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was, or how the result was arrived at. By the second section of the statute in question, it is provided that all charges made by a common carrier for the transportation of passengers or property shall be equal and reasonable. Under this provision, the carrier has a right to make equal and reasonable charges for such transportation. In the present case, the return alleged that the rate of charge fixed by the commission was not equal or rea-

sonable, and the supreme court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the constitution of the United States; and, in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws. It is provided by section 4 of article 10 of the constitution of Minnesota of 1857, that "lands may be taken for public way, for the purpose of granting to any corporation the franchise of way for public use," and that "all corporations, being common carriers, enjoying the right of way in pursuance to the provisions of this section, shall be bound to carry the mineral, agricultural, and other productions and manufactures on equal and reasonable terms." It is thus perceived that the provision of section 2 of the statute in question is one enacted in conformity with the constitution of Minnesota.

The issuing of the peremptory writ of *mandamus* in this case was, therefore, unlawful, because in violation of the constitution of the United States; and it is necessary that the relief administered in favor of the plaintiff in error should be a reversal of the judgment of the supreme court awarding that writ, and an instruction for further proceedings by it not inconsistent with the opinion of this court. In view of the opinion delivered by that court, it may be impossible for any further proceedings to be taken other than to dismiss the proceeding for a *mandamus*, if the court should adhere to its opinion that, under the statute, it cannot investigate judicially the reasonableness of the rates fixed by the commission. Still, the question will be open for review; and the judgment of this court is that the judgment of the supreme court of Minnesota, entered May 4, 1888, awarding a peremptory writ of *mandamus* in this case, be reversed, and the case be remanded to that court, with an instruction for further proceedings not inconsistent with the opinion of this court.

BRADLEY, GRAY, and LAMAR, JJ., dissent.

MILLER, J. I concur with some hesitation in the judgment of the court, but wish to make a few suggestions of the principles which I think should govern this class of questions in the courts. Not desiring to make a dissent, nor a prolonged argument in favor of any views I may have, I will state them in the form of propositions.

1. In regard to the business of common carriers limited to points within a single state, that state has the legislative power to establish the rates of compensation for such carriage.

2. The power which the legislature has to do this can be exercised through a commission which it may authorize to act in the matter, such as the one appointed by the legislature of Minnesota by the act now under consideration.

3. Neither the legislature, nor such commission acting under the authority of the legislature, can establish arbitrarily, and without regard to justice and right, a tariff of rates for such transportation which is so unreasonable as to practically destroy the value of property of persons engaged in the carrying business, on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation, on the other.

4. In either of these classes of cases there is an ultimate remedy by the parties aggrieved, in the courts, for relief against such oppressive legislation, and especially in the courts of the United States, where the tariff of rates established either by the legislature or by the commission is such as to deprive a party of his property without due process of law.

5. But until the judiciary has been appealed to, to declare the regulations made, whether by the legislature or by the commission, voidable, for the reasons mentioned, the tariff of rates so fixed is the law of the land, and must be submitted to both by the carrier, and the parties with whom he deals.

6. That the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature, or by its commission, is by a bill in chancery asserting its unreasonable character, and its conflict with the constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.

7. That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method.

8. But in the present case, where an application is made to the supreme court of the state to compel the common carriers, namely, the railroad companies, to perform the services which their duty requires them to do for the general public, which is equivalent to establishing by judicial proceeding the reasonableness of the charges fixed by the commission, I think the court has the same right and duty to inquire into the reasonableness of the tariff of rates established by the commission, before granting such relief, that it would have if called upon so to do by a bill in chancery.

9. I do not agree that it was necessary to the validity of the action of the commission that previous notice should have been given to all common carriers interested in the rates to be established, nor to any particular one of them, any more than it would have been necessary—which I think it is not—for the legislature to have given such notice if it had established such rates by legislative enactment.

10. But when the question becomes a judicial one, and the validity and justice of these rates are to be established or rejected by the judgment of a court, it is necessary that the railroad corporations interested in the fare to be considered should have notice, and have a right to be heard on the question relating to such fare, which I have pointed out as judicial questions. For the refusal of the supreme court of Minnesota to receive evidence on this subject, I think the case ought to be reversed on the ground that this is a denial of due process of law in a proceeding which takes the property of the company; and, if this be a just construction of the statute of Minnesota, it is for that reason void.

BRADLEY, J., (dissenting.) I cannot agree to the decision of the court in this case. It practically overrules Munn v. Illinois, 94 U. S. 113, and the several railroad cases that were decided at the same time. The governing principle of those cases was that the regulation and settlement of the fares of railroads and other public accommodations is a legislative prerogative, and not a judicial one. This is a principle which I regard as of great importance. When a railroad company is chartered, it is for the purpose of performing a duty which belongs to the state itself. It is chartered as an agent of the state for furnishing public accommodation. The state might build its railroads, if it saw fit. It is its duty and its prerogative to provide means of intercommunication between one part of its territory and another. And this duty is devolved upon the legislative department. If the legislature commissions private parties, whether corporations or individuals, to perform this duty, it is its prerogative to fix the fares and freights which they may charge for their services. When merely a road or a canal is to be constructed, it is for the legislature to fix the tolls to be paid by those who use it; when a company is chartered, not only to build a road, but to carry on public transportation upon it, it is for the legislature to fix the charges for such transportation.

But it is said that all charges should be reasonable, and that none but reasonable charges can be exacted; and it is urged that what is a reasonable charge is a judicial question. On the contrary, it is pre-eminently a legislative one, involving considerations of policy, as well as of remuneration; and is usually determined by the legislature, by fixing a maximum of charges in the charter of the company, or afterwards, if its hands are not tied by contract. If this maximum is not exceeded, the courts cannot interfere. When the rates are not thus determined, they are left to the discretion of the company, subject to the express or implied condition that they shall be reasonable—express, when so declared by statute; implied by the common law, when the statute is silent; and the common law has effect by virtue of the legislative will. Thus the legislature either fixes the charges at rates which it deems reasonable, or merely declares that they shall be reasonable; and it is only in the latter case, where what is reasonable is left open, that the courts have jurisdiction of the subject. I repeat, when the legislature declares that the charges shall be reasonable, or, which is the same thing, allows the common law rule to that effect to prevail, and leaves the matter there, then resort may be had to the courts to inquire judicially whether the charges are reasonable. Then, and not till then, is it a judicial question. But the legislature has the right, and it is its prerogative, if it chooses to exercise it, to declare what is reasonable. This is just where I differ from the majority of the court. They say in effect, if not in terms, that the final tribunal of arbitrament is the judiciary. I say it is the legislature. I hold that it is a legislative question, not a judicial one, unless the legislature or the law (which is the same thing) has made it judicial by prescribing the rule that the charges shall be reasonable, and leaving it there.

It is always a delicate thing for the courts to make an issue with the legislative department of the government, and they should never do so if it is possible to avoid it. By the decision now made, we declare, in effect, that the judiciary, and not the legislature, is the final arbiter in the regulation of fares and freights of railroads, and the charges of other public accommodations. It is an assumption of authority on the part of the judiciary which, it seems to me, with all due deference to the judgment of my brethren it has no right to make. The assertion of jurisdiction by this court makes it the duty of every court of general jurisdiction, state or federal, to entertain complaints against the decisions of the boards of commissioners appointed by the states to regulate their railroads; for all courts are bound by the constitution of the United States, the same as we are. Our jurisdiction is merely appellate. The incongruity of this position will appear more distinctly by a reference to the nature of the cases under consideration. The question presented before the commission in each case was one relating simply to the reasonableness of the rates charged by the companies,—a question of more or less. In the one case the company charged 3 cents per gallon for carrying milk between certain points. The commission deemed this to be unreasonable, and reduced the charge to 2½ cents. In the other case the company charged $1.25 per car for handling and switching empty cars over its lines within the city of Minneapolis, and $1.50 for loaded cars; and the commission decided that $1 per car was a sufficient charge in all cases. The companies complain that the charges as fixed by the commission are

unreasonably low, and that they are deprived of their property without due process of law; that they are entitled to a trial by a court and jury, and are not barred by the decisions of a legislative commission. The state court held that the legislature had a right to establish such a commission, and that its determinations are binding and final, and that the courts cannot review them. This court now reverses that decision, and holds the contrary. In my judgment the state court was right; and the establishment of the commission, and its proceedings, were no violation of the constitutional prohibition against depriving persons of their property without due process of law.

I think it is perfectly clear, and well settled by the decisions of this court, that the legislature might have fixed the rates in question. If it had done so, it would have done it through the aid of committees appointed to investigate the subject, to acquire information, to cite parties, to get all the facts before them, and finally to decide and report. No one could have said that this was not due process of law. And if the legislature itself could do this, acting by its committees, and proceeding according to the usual forms adopted by such bodies, I can see no good reason why it might not delegate the duty to a board of commissioners, charged, as the board in this case was, to regulate and fix the charges so as to be equal and reasonable. Such a board would have at its command all the means of getting at the truth, and ascertaining the reasonableness of fares and freights, which a legislative committee has. It might or it might not swear witnesses and examine parties. Its duties being of an administrative character, it would have the widest scope for examination and inquiry. All means of knowledge and information would be at its command; just as they would be at the command of the legislature which created it. Such a body, though not a court, is a proper tribunal for the duties imposed upon it. In the case of Davidson v. City of New Orleans, 96 U. S. 97, we decided that the appointment of a board of assessors for assessing damages was not only due process of law, but the proper method for making assessments to distribute the burden of a public work among those who were benefited by it. No one questions the constitutionality or propriety of boards for assessing property for taxation, or for the improvement of streets, sewers, and the like, or of commissions to establish county seats, and for doing many other things appertaining to the administrative management of public affairs. Due process of law does not always require a court. It merely requires such tribunals and proceedings as are proper to the subject in hand. In the Railroad Commission Cases, 116 U. S. 307, 6 Sup. Ct. Rep. 334–350, 388, 391, 1191, we held that a board of commissioners is a proper tribunal for determining the proper rates of fare and freight on the railroads of a state. It seems to me, therefore, that the law of Minnesota did not prescribe anything that was not in accordance with due process of law in creating such a board, and investing it with the powers in question.

It is complained that the decisions of the board are final and without appeal. So are the decisions of the courts in matters within their jurisdiction. There must be a final tribunal somewhere for deciding every question in the world. Injustice may take place in all tribunals. All human institutions are imperfect,—courts as well as commissions and legislatures. Whatever tribunal has jurisdiction, its decisions are final and conclusive, unless an appeal is given therefrom. The important question always is, what is the lawful tribunal for the particular case? In my judgment, in the present case, the proper tribunal was the legislature, or the board of commissioners which it created for the purpose.

If not in terms, yet in effect, the present cases are treated as if the constitutional prohibition was that no state shall take private property for public use without just compensation, and as if it was our duty to judge of the compensation. But there is no such clause in the constitution of the United States. The fifth amendment is prohibitory upon the federal government only, and not upon the state governments. In this matter,—just compensation for property taken for public use,—the states make their own regulations, by constitution or otherwise. They are only required by the federal constitution to provide "due process of law." It was alleged in Davidson v. New Orleans that the property assessed was not benefited by the improvement; but we held that that was a matter with which we would not interfere. The question was whether there was due process of law. 96 U. S. 106. If a state court renders an unjust judgment, we cannot remedy it.

I do not mean to say that the legislature, or its constituted board of commissioners, or other legislative agency, may not so act as to deprive parties of their property without due process of law. The constitution contemplates the possibility of such an invasion of rights. But, acting within their jurisdiction, (as in these cases they have done,) the invasion should be clear and unmistakable to bring the case within that category. Nothing of the kind exists in the cases before us. The legislature, in establishing the commission, did not exceed its power; and the commission, in acting upon the cases, did not exceed its jurisdiction, and was not chargeable with fraudulent behavior. There was merely a difference of judgment as to amount between the commission and the companies, without any indication of intent on the part of the former to do injustice. The board may have erred; but if they did, as the matter was within their rightful jurisdiction, their decision was final and conclusive, unless their proceedings could be impeached for fraud. Deprivation of property by mere arbitrary power on the part of the legislature, or fraud on the part of the commission, are the only grounds on which judicial relief may be sought against their action. There was, in truth, no deprivation of

property in these cases at all. There was merely a regulation as to the enjoyment of property, made by a strictly competent authority, in a matter entirely within its jurisdiction. It may be that our legislatures are invested with too much power, open, as they are, to influences so dangerous to the interests of individuals, corporations, and society. But such is the constitution of our republican form of government, and we are bound to abide by it till it can be corrected in a legitimate way. If our legislatures become too arbitrary in the exercise of their powers, the people always have a remedy in their hands. They may at any time restrain them by constitutional limitations. But, so long as they remain invested with the powers that ordinarily belong to the legislative branch of government, they are entitled to exercise those powers; among which, in my judgment, is that of the regulation of railroads and other public means of intercommunication, and the burdens and charges which those who own them are authorized to impose upon the public.

I am authorized to say that Mr. Justice GRAY and Mr. Justice LAMAR agree with me in this dissenting opinion.

NOTE.

Chapter 10. An act to regulate common carriers, and creating the railroad and warehouse commission of the state of Minnesota, and defining the duties of such commission in relation to common carriers.

Be it enacted by the legislature of the state of Minnesota:

Section 1. (*a*) That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management, or arrangement, for a carriage or shipment from one place or station to another, both being within the state of Minnesota: provided, that nothing in this act shall apply to street railways or to the carriage, storage, or handling by any common carrier of property, free, or at reduced rates, for the United States, or for the state of Minnesota, or for any municipal government or corporation within the state, or for any charitable purpose, or to or from fairs and expositions, for exhibition thereat, of stock for breeding purposes, or to the issuance of mileage, excursion, or commutation passenger tickets, at rates made equal to all, or to transportation to stock shippers with cars, and nothing in the provisions of this act shall be construed to prevent common carriers, subject to the provisions of this act, from issuing passes for the free transportation of passengers. (*b*) The term "railroad" as used in this act shall include all bridges or ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

Sec. 2. (*a*) That all charges made by any common carrier, subject to the provisions of this act, for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be equal and reasonable; and every unequal and unreasonable charge for such service is prohibited, and declared to be unlawful: provided, that one car-load of freight of any kind or class shall be transported at as low a rate per ton, and per ton per mile, as any greater number of car-loads of the same kind and class, from and to the same points of origination or destination. (*b*) It shall be unlawful for any common carrier subject to the provisions of this act to make or give any unequal or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any unequal or unreasonable prejudice or disadvantage in any respect whatsoever.

Sec. 3. (*a*) That all common carriers subject to the provisions of this act shall, according to their respective powers, provide, at the point of connection, crossing or intersection, ample facilities for transferring cars, and for accommodating and transferring passengers, and traffic of all kinds and classes, from their lines or tracks to those of any other common carrier whose lines or tracks may connect with, cross, or intersect their own, and shall afford all equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property and cars to and from their several lines and those of other common carriers connecting therewith, and shall not discriminate in their rates and charges between such connecting lines, or on freight coming over such lines; but this shall not be construed as requiring any common carrier to use for another common carrier its tracks, equipments, or terminal facilities without reasonable compensation. (*b*) That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time or schedule, or by carriage in different cars, or by any other means or devices, the carriage or freight from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freight from being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith, for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage, or to evade any of the provisions of this act. (*c*) Every common carrier operating a railway in this state shall, without unreasonable delay, furnish, start, and run cars for the transportation of persons and property which, within a reasonable time theretofore, is offered for transportation at any of its stations on its line of road, and at the junctions of other railroads, and at such stopping places as may be established for receiving and discharging passengers and freights, and shall take, receive, transport, and discharge such passengers and property at, from, and to such stations, junctions, and places, on and from all trains advertised to stop at the same for passengers and freights, respectively, upon the due payment, or tender of payment, of tolls, freight, or fare therefor, if such payment is demanded. Every such common carrier shall permit connections to be made and maintained in a reasonable manner with its side tracks to and from any warehouse, elevator, or manufactory, without reference to its size or capacity: provided, that this shall not be construed so as to require any common carrier to construct or furnish any side track off from its own land: provided further, that, where stations are ten (10) miles or more apart, the common carrier, when required to do so by the railroad and warehouse commissioners, shall construct and maintain a side track for the use of shippers between such stations. (*d*) Whenever any property is received by any common carrier, subject to the provisions of this act, to be transported from one place to another within this state, it shall be unlawful for such common carrier to limit in any way, except as stated in its classification schedule hereinafter provided for, its common-law liability with reference to such property while in its custody as a common carrier, as hereinbefore mentioned. Such liability must include the absolute responsibility

of the common carrier for the acts of its agents in relation to such property.

Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the division or pooling of business of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and, in case of an agreement for the pooling of their business aforesaid, each day of its continuance shall be deemed a separate offense.

Sec. 5. That, if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this act than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of passengers or property, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited, and declared to be unlawful.

Sec. 6. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation for the transportation of passengers, or of like kind or class and quantity of property, for a shorter than for a longer distance over the same line,—the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier subject to the provisions of this act to charge or receive as great compensation for a shorter as for a longer distance: provided, however, that, upon application to the commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the commissioners, be authorized to charge less for longer than for shorter distances, for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

Sec. 7. (*a*) That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation per ton per mile, for the contemporaneous transportation of the same class of freight, for a longer than for a shorter distance over the same line, in the same general direction, or from the same original point of departure, or to the same point of arrival; but this shall not be construed as authorizing any common carrier subject to the provisions of this act to charge as high a rate per ton per mile for a longer as for a shorter distance. (*b*) Whenever any railway company doing business in this state shall be unable, from any reasonable cause, to furnish cars at any railway station or side track, in accordance with the demands made by all persons demanding cars at such stations or side tracks for the shipment of grain or other freight, such cars as are furnished shall be divided as equally as may be among the applicants until each shipper shall have received at least one car, when the balance shall be divided ratably in proportion to the amount of daily receipts of grain or other freight to each shipper, or to the amount of grain offered at such station on side tracks. (*c*) There shall in no case be more than one terminal charge for switching or transferring any car, whether the same is loaded or empty, within the limits of any one city or town. If it is necessary that any car pass over the tracks of more than one company, within such city or town limits, in order to reach its final destination, or to be returned therefrom to its owner or owners, then the company first switching or transferring such car shall be entitled to receive the entire charge to be made therefor, and shall be liable to the company or companies doing the subsequent switching or transferring thereof for its or their reasonable and equitable share of the compensation received; and, if the companies so jointly interested therein cannot agree upon the share thereof which each is entitled to receive, the same shall be determined by the board of railroad and warehouse commissioners, whose decision thereon shall be final and conclusive upon all parties interested; and the said board are authorized to establish such rules —regulations—in that behalf as to them may seem just and reasonable, and not in conflict with this act.

Sec. 8. (*a*) That every common carrier subject to the provisions of this act shall, within sixty (60) days after this act shall take effect, print, and thereafter keep for public inspection, schedules showing the classification, rates, fares, and charges for the transportation of passengers and property of all kinds and classes which such common carrier has established, and which are in force at the time, upon its railroad, as defined by the first (1st) section of this act. This schedule, printed as aforesaid by such common carrier, shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain classification of freight in force upon each of the lines of such railroad, a distance tariff, and a table of interstation distances, and shall also state separately the terminal charges, and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, and charges. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept in every depot or station upon any such railroad, in such places and in such form that they can be conveniently inspected. (*b*) No change of classification shall be made, and no change shall be made in the rates, fares, and charges which have been established and published as aforesaid, by any common carrier, in compliance with the requirements of this section, except after ten (10) days' public notice, which notice shall plainly state the changes proposed to be made in the schedules then in force, and the time when the changed schedules will go into effect; and the proposed changes will be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time, and kept for public inspection. (*c*) And, when any common carrier shall have established and published its classifications, rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any service in connection therewith, than is specified in such published schedule of classifications, rates, fares, and charges as may at the time be in force. (*d*) Every common carrier subject to the provisions of this act shall file with the commission hereafter provided for in section ten (10) of this act copies of its schedules of classifications, rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said commission of all changes proposed to be made in the same. Every [such] common carrier shall also file with said commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which contracts, agreements, or arrangements it may be a party. And, in cases where passengers or freight pass over lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint schedules of rates or fares, or charges or classifications for such lines or routes, copies of such joint schedules shall also, in like manner, be filed with said commission. Such joint schedules of rates, fares, charges, and classifications for such lines, so filed as aforesaid, shall also be made public by such common carriers, in the same manner as hereinbefore provided for the publication of tariffs upon its own lines. (*e*) That, in case the commission shall at any time

find that any part of the tariffs of rates, fares, charges, or classifications so filed and published as hereinbefore provided are in any respect unequal or unreasonable, it shall have the power, and is hereby authorized and directed, to compel any common carrier to change the same, and adopt such rate, fare, charge, or classification as said commission shall declare to be equal and reasonable. To which end the commission shall in writing inform such common carrier in what respect such tariff of rates, fares, charges, or classifications are unequal and unreasonable, and shall recommend what tariffs shall be substituted therefor. (*f*) In case such common carrier shall neglect or refuse for ten (10) days after such notice to substitute such tariff of rates, fares, charges, or classifications, or to adopt the same as recommended by the commission, it shall be the duty of said commission to immediately publish such tariff of rates, fares, charges, or classifications as they had declared to be equal and reasonable, and cause the same to be posted at all the regular stations on the line of such common carrier in this state; and thereafter it shall be unlawful for such common carrier to charge or maintain a higher or lower rate, fare, charge, or classification than that so fixed and published by said commission. (*g*) If any common carrier subject to the provisions of this act shall neglect or refuse to publish or file its schedule of classifications, rates, fares, or charges, or any part thereof, as provided in this section, or if any common carrier shall refuse or neglect to carry out such recommendation made and published by such commission, such common carrier shall be subject to a writ of *mandamus*, to be issued by any judge of the supreme court or of any of the district courts of this state, upon application of the commission, to compel compliance with the requirements of this section, and with the recommendation of the commission; and failure to comply with the requirements of said writ of *mandamus* shall be punishable as and for contempt; and the said commission, as complainants, may also apply to any such judge for a writ of injunction against such common carrier from receiving or transporting property or passengers within this state until such common carrier shall have complied with the requirements of this section, and the recommendation of said commission; and, for any willful violation or failure to comply with such requirements or such recommendation of said commission, the court may award such costs, including counsel fees, by way of penalty, on the return of said writs, and after due deliberation thereon, as may be just.

Sec. 9. (*a*) That a commission is hereby created and established to be known as the "Railroad and Warehouse Commission of the State of Minnesota," which shall be composed of three (3) commissioners, who shall be appointed by the governor, by and with the advice and consent of the senate. (*b*) The commissioners first appointed under this act shall continue in office for the term of one, (1,) two, (2,) and three (3) years, respectively, and until their successors are appointed and qualified, beginning with the first (1st) Monday of January, A. D. 1889; the term of each to be designated by the governor, but their successors shall be appointed for a term of three (3) years, and until their successors are appointed and qualified, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. Any commissioner may be removed by the governor for inefficiency, neglect of duty, or malfeasance in office. Said commissioners shall not engage in any other business, vocation, or employment while acting as such commissioners. No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission. (*c*) Vacancies occasioned by removal, resignation, or other cause shall be filled by the governor as provided in case of original appointments. Not more than two of the commissioners appointed shall be members of the same political party. No person in the employ of, or holding any official relation to, any common carrier subject to the provisions of this act, or any law of this state, or owning stocks or bonds, or other property thereof, or who is in any manner interested therein, shall enter upon the duties of or hold such office. (*d*) The decision of a majority of the commission shall be considered the decision of the commission on all questions arising for its consideration. Before entering upon the duties of his office, each commissioner shall make and subscribe, and file with the secretary of state, an affidavit in the following form: 'I do solemnly swear (or affirm, as the case may be) that I will support the constitution of the United States, and the constitution of the state of Minnesota, and that I will faithfully discharge my duties as a member of the railroad and warehouse commission of the state of Minnesota, according to the best of my ability; and I further declare that I am not in the employ of, or holding any official relation to, any common carrier within this state; nor am I in any manner interested in any stock, bonds, or other property of such common carrier.' (*e*) Each commissioner so appointed and qualified shall enter into bonds [to] of the state of Minnesota, to be approved by the governor, in the sum of twenty thousand (20,000) dollars, conditioned for the faithful performance of his duty as a member of such commission, which bond shall be filed with the secretary of state. (*f*) The commission shall conduct its proceedings in such a manner as will best conduce to the proper dispatch of business, and to the ends of justice. A majority of the commissioners shall constitute a quorum for the transaction of business, but no commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said commissioner may from time to time make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and service thereof, which shall conform as nearly as may be to those in use in the courts of this state. Any party may appear before said commission, and be heard in person or by attorney. Every vote and official act of the commission shall be entered of record, and its proceedings shall be public upon the request of either party interested, or at the discretion of the commission. Said commission shall have an official seal, which shall be judicially noticed. Any member of the commission may administer oaths and affirmations. The principal office of the commission shall be in the city of St. Paul, where its general sessions shall be held. (*g*) Whenever the convenience of the public or of the parties may be promoted, or delay or expenses prevented thereby, the commission may hold special sessions in any part of the state. It may, by one or more of the commissioners, prosecute any inquiry necessary to its duties in any part of the state, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this act. (*h*) The attorney general of the state of Minnesota shall be *ex officio* attorney for the commission, and shall give them such counsel and advice as they may from time to time require; and he shall institute and prosecute any and all suits which said railroad and warehouse commission may deem it expedient and proper to institute; and he shall render to such railroad and warehouse commission all counsel, advice, and assistance necessary to carry out the provisions of this act, or of any law of this state, according to the true intent and meaning thereof. It shall likewise be the duty of the county attorney of any county in which suit is instituted or prosecuted to aid in the prosecution of the same to a final issue upon the request of such commission. Said commission are hereby authorized, when the facts in any given case shall in their judgment warrant, to employ any and all additional legal counsel that they may think proper, expedient, and necessary to assist the attorney general or any county attorney in the conduct and prosecution of any suit they may determine to bring under the provisions of this act, or of any law of this state.

Sec. 10. (*a*) That the commission hereby cre-

ated shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties, and carry out the objects, for which it was created. In order to enable said commissioners efficiently to perform their duties under this act, it is hereby made their duty to cause one of their number to visit the various stations on the lines of each railroad as often as practicable, after giving twenty (20) days' notice of such visit, and the time and place thereof, in the local newspapers, and at least once in twelve (12) months to visit each county in the state in which is or shall be located a railroad station, and personally inquire into the management of such railroad business; and, for this purpose, all railroad companies and common carriers, and their officers and employes, are required to aid and furnish each member of the railroad and warehouse commission with reasonable and proper facilities; and each or all of the members of said commission shall have the right, in his or their official capacity, to pass free on any railroad trains on all railroads in this state, and to enter and remain in, at all suitable times, any and all cars, offices, or depots, or upon the railroads, of any railroad company in this state, in the performance of official duties; and whenever, in the judgment of the commission, it shall appear that any common carrier fails in any respect or particular to comply with the laws of this state, or whenever, in their judgment, any repairs are necessary upon its railroad, or any addition to or change of its stations or station-houses is necessary, or any change in the mode of operating its road or conducting its business is reasonable or expedient, in order to promote the security, convenience, and accommodation of the public, said commission shall inform such railroad company, by a notice thereof in writing, to be served as a summons in civil actions is required to be served by the statutes of this state in actions against corporations, certified by the commission's clerk or secretary; and, if such common carrier shall neglect or refuse to comply with such order, then the commission may, in its discretion, cause suits or proceedings to be instituted to enforce its orders as provided in this act.

Sec. 11. (*a*) That, in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done, any act or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons, party or parties, injured thereby, for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorneys' fee, to be fixed by the court in every case of recovery, which attorney's fees shall be taxed and collected as part of the costs in the case. (*b*) That any person or persons, party or parties, claiming to be damaged by the action or non-action of any common carrier subject to the provisions of this act, may either make complaint to the commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district court of this state of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies at the same time. (*c*) In any action brought for the recovery of damages, the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of any corporation or company, defendant in such suit, to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company, party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Sec. 12. That any common carrier, subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willfully suffer or permit to be done, any act, matter, or thing in this act prohibited, or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done, not to be so done, or shall aid and abet therein any such omission, or shall be guilty of any willful infraction of this act, or shall aid or abet therein, shall be deemed guilty of a violation of the provisions of this act, and shall, upon conviction thereof in any district court of the state within the jurisdiction of which such offense was committed, be subject to a penalty of not less than two thousand five hundred (2,500) dollars or more than five thousand (5,000) dollars for the first offense, and not less than five thousand (5,000) dollars or more than ten thousand (10,000) dollars for each subsequent offense.

Sec. 13. (*a*) That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act, in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts. (*b*) Whereupon a statement of the charges thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing within a reasonable time, to be specified by the commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission summarily to investigate the matter complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of absence of direct damages to the complainant. And, for the purposes of this act, the commission shall have power to require the attendance of witnesses, and the production of all books, papers, contracts, agreements, and documents relating to any matter under investigation, and to that end may invoke the aid of any of the courts of this state, in requiring the attendance of witnesses, and the production of books, papers, and documents, under the provisions of this act. (*c*) Any of the district courts of this state within the jurisdiction of which such inquiry is carried on shall, in case of contumacy or refusal to obey a subpœna issued by the commissioners to any common carrier subject to the provisions of this act, or, when such common carrier is a corporation, to an officer or agent thereof, or to any person connected therewith, if proceedings are instituted in the name of such commission as plaintiffs, issue an order requiring such common carrier, officer, or agent, or person to show cause why such contumacy or refusal should not be punished as and for contempt; and if, upon the hearing, the court finds that the inquiry is within the jurisdiction of the commission, and that such contumacy or refusal is willful, and the same is persisted in, such contumacy or refusal shall be punished as though the same had taken place in an action pending in the district court

for any judicial district in this state. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such persons on the trial of any criminal proceeding.

Sec. 14. (*a*) Whenever an investigation shall be made by said commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found. All reports of investigations made by the commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of, and the record thereof shall be public. (*b*) If, in any case in which an investigation shall be made by said commission, it shall be made to appear to the satisfaction of the commission, either by testimony of witnesses or other evidence, that anything has been done or omitted to be done by any common carrier in violation of the provisions of this act, or of any law cognizable by said commission, or that any injury or damages has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, and to make reparation for the injury so found to have been done, within a brief but reasonable time, to be specified by the commission; and if, within the time specified, it shall be made to appear to the commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law. (*c*) But if said common carrier shall neglect or refuse, within the time specified, to desist from such violation of law, and make reparation for the injury done in compliance with the report and notice of the commission as aforesaid, it shall be the duty of the commission to forthwith certify the fact of such neglect or refusal, and forward a copy of its report and such certificate to the attorney general of the state for redress and punishment as hereinafter provided.

Sec. 15. (*a*) That it shall be the duty of the attorney general to whom said commission may forward its report and certificate, as provided in the next preceding section of this act, when it shall appear from such report that any injury or damages has been sustained by any party or parties by reason of such violation of law by such common carrier, to forthwith cause suit to be brought in the district court in the judicial district wherein such violation occurred, on behalf and in the name of the person or persons injured, against such common carrier, for the recovery of damages for such injury as may have been sustained by the injured party; and the cost and expenses of such prosecution shall be paid out of the appropriation hereinafter provided for the uses and purposes of this act. (*b*) And the said court shall have power to hear and determine the matter on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice shall be served on such common carrier, his or its officers, agents, or servants, in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily, and without the formal pleading and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it thinks fit, to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition. And on such hearing the report of said commission shall be *prima facie* evidence of the matters therein stated. (*c*) And, if it be made to appear to such court on such hearing, or on report of any such person or persons, that the lawful order or requirement of such commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction, or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation, or such disobedience of such order or requirement of said commission, and enjoining obedience to the same; and, in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and, if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding, for each carrier or person in default, the sum of five hundred (500) dollars for every day after a day to be named in the order, that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining, or into court to abide the ultimate decision of the court; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree *in personam* in such court. Either party to such proceeding before said court may appeal to the supreme court of the state, under the same regulations now provided by law in respect to security for such appeal; but such appeal shall not operate to stay or supersede the order of the court, or the execution of any writ or process thereon, unless the court hearing or deciding such case should otherwise direct; and such court may in every such matter order the payment of such costs and counsel fees as shall be deemed reasonable. (*d*) In case the attorney general shall not, within a period of ten (10) days after the making of any order by the commission, commence judicial proceedings for the enforcement thereof, any railroad company or other common carrier affected by such order may, at any time within the period of thirty (30) days after the service [of it] upon him or it of such order, and before commencement of proceedings, appeal therefrom to the district court of any judicial district through or into which his or its route may run, by the service of a written notice of such appeal upon some member or the secretary of such commission. And upon the taking of such appeal, and the filing of the notice thereof, with the proof of service, in the office of the clerk of such court, there shall be deemed to be pending in such court a civil action of the character and for the purposes mentioned in sections eleven (11) and fifteen (15) of this act. Upon such appeal, and upon the hearing of any application for the enforcement of any such order made by the commission or by the attorney general, the court shall have jurisdiction to examine the whole matter in controversy, including matters of fact as well as questions of law, and to affirm, modify, or rescind such order in whole or in part, as justice may require; and, in case of

any order being modified as aforesaid, such modified order shall, for all the purposes contemplated by this act, stand in place of the original order so modified. No appeal as aforesaid shall stay or supersede the order appealed from in so far as such order shall relate to rates of transportation, or to modes of transacting the business of the appellant with the public, unless the court hearing or deciding such case shall so direct.

Sec. 16. (*a*) That whenever facts, in any manner ascertained by said commission, shall in its judgment warrant a prosecution, it shall be the duty of said commission to immediately cause suit to be instituted and prosecuted against any common carrier who may violate any of the provisions of this act, or of any law of this state. All such prosecutions shall be in the name of the state of Minnesota, except as is otherwise provided in this act, or in any law of this state, and may be instituted in any county in the state through or into which the line of any common carrier so sued may extend; and all penalties recovered under the provisions of this act, or of any law of this state, in any suit instituted in the name of the state, shall be immediately paid into the state treasury by the sheriff or other officer or person collecting the same, and the same shall be by the state treasurer placed to the credit of the general revenue fund. (*b*) For the purposes of this act, except its penal provisions, the district courts of this state shall be deemed to be always in session.

Sec. 17. (*a*) That the commission is hereby directed to require annual reports from all common carriers subject to the provisions of this act, to fix the time and prescribe the manner in which said reports shall be made, and to require from such carriers specific answers to all questions upon which the commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same, the dividends paid, the surplus fund, if any, and the number of stockholders, the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipment; the number of employes, and the salary paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts of each branch of business, and from all sources; the operating and other expenses; the balance of profit and loss; and complete exhibit of the financial operations of the carrier each year, including an annual balance-sheet; also, the total number of acres of land received as grants either from the United States or from the state of Minnesota, the number [of] acres of said grants sold, and average price received per acre, the number acres of grants unsold, and the appraised value per acre. Such detailed reports shall also contain such information in relation to rates or regulations concerning fares or freights and agreements, arrangements or contracts with express companies, telegraph companies, sleeping and dining car companies, fast freight lines, and other common carriers, as the commission may require, with copies of such contracts, agreements, or arrangements. (*b*) And the commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe (if, in the opinion of the commission, it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

Sec. 18. (*a*) That such commissioners shall, on or before the first (1st) day of December in each year, and oftener, if required by the governor to do so, make a report to the governor of their doings for the preceding year, containing such facts, statements, and explanations as will disclose the actual workings of the system of railroad transportation in its bearings upon the business and prosperity of the people of this state, and such suggestions in relation thereto as to them may seem appropriate. (*b*) They shall also, at such times as the governor shall direct, examine any particular subject connected with the conditions and management of such railroads, and report to him in writing their opinion thereon, with their reasons therefor. Said commissioners shall also investigate and consider what, if any, amendment or revision of the railroad laws of this state the best interests of the state demand, and they shall make a special biennial report on said subject to the governor. All such reports made to the governor shall be by him transmitted to the legislature at the earliest practicable time. (*c*) Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: provided, that no pending litigation shall in any way be affected by this act.

Sec. 19. Each commissioner shall receive an annual salary of three thousand (3,000) dollars, payable in the same manner as the salaries of other state officers. The commissioners shall appoint a secretary, who shall receive an annual salary of eighteen hundred (1,800) dollars, payable in like manner. Said secretary shall, before entering upon the duties of his office, make and file with the secretary of state an affidavit in the following form: "I do solemnly swear or affirm (as the case may be) that I will support the constitution of the United States and the constitution of the state of Minnesota, and that I will faithfully discharge my duties as secretary of the railroad and warehouse commission of the state of Minnesota, according to the best of my ability; and I further declare that I am not in the employ of, or holding any official relation to, any common carrier or grain warehouseman within said state, nor am I in any manner interested in any stock, bonds, or other property of such common carrier or grain warehouseman." The said secretary so appointed and qualified shall enter into bonds to the state of Minnesota, to be approved by the governor, in the sum of ten thousand (10,000) dollars, conditioned for the faithful performance of his duty as secretary of such commission, which bond shall be filed with the secretary of state. The commission shall have authority to employ and fix the compensation for such other employes as it may find necessary to the proper performance of its duties, subject to the approval of the governor of the state. The commissioners shall be furnished with a suitable office, and all necessary office supplies. Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the district courts of the state. All the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners, or by their employes under their order, in making any investigation in any other place than the city of St. Paul, shall be allowed and paid out of the state treasury on the presentation of itemized vouchers therefor approved by the chairman of the commission and the state auditor.

Sec. 20. That the sum of fifteen thousand (15,000) dollars is hereby appropriated for the use and purposes of this act for the fiscal year ending July thirty-first, (31st,) eighteen hundred and eighty-eight, (1888;) and the sum of fifteen thousand (15,000) dollars is hereby appropriated for the uses and purposes of this act for the fiscal year ending July thirty-first, (31st,) eighteen hundred and eighty nine, (1889.)

Sec. 21. That all acts and parts of acts inconsistent herewith are hereby repealed: provided, that the provisions of this act shall apply to and govern the existing railroad and warehouse commissioners appointed by virtue of an act approved March fifth, (5th,) eighteen hundred and eighty-five, (1885,) who are hereby clothed with the powers, and charged with the duties and responsibilities, of this act, granted to and imposed upon the railroad and warehouse commissioners of the state of Minnesota.

Sec. 22. This act shall take effect and be in force from and after its passage.

Approved March 7, 1887.

POWELL v. COMMONWEALTH OF PENNSYLVANIA.

(8 Sup. Ct. 992, 127 U. S. 678.)

Supreme Court of the United States. April 9, 1888.

In error to the supreme court of the state of Pennsylvania.

D. T. Watson, for plaintiff in error. Wayne MacVeagh and W. S. Kirkpatrick, Atty. Gen., for defendant in error.

HARLAN, J. This writ of error brings up for review a judgment of the supreme court of Pennsylvania, sustaining the validity of a statute of that commonwealth relating to the manufacture and sale of what is commonly called "oleomargarine butter." That judgment, the plaintiff in error contends, denies to him certain rights and privileges specially claimed under the fourteenth amendment to the constitution of the United States. By acts of the general assembly of Pennsylvania, one approved May 22, 1878, and entitled "An act to prevent deception in the sale of butter and cheese," and the other approved May 24, 1883, and entitled "An act for the protection of dairymen, and to prevent deception in sales of butter and cheese," provision was made for the stamping, branding, or marking, in a prescribed mode, manufactured articles or substances in semblance or imitation of butter or cheese, not the legitimate product of the dairy, and not made exclusively of milk or cream, but into which oil, lard, or fat, not produced from milk or cream, entered as a component part, or into which melted butter, or any oil thereof, had been introduced to take the place of cream. Laws Pa. 1878, p. 87; 1883, p. 43. But this legislation, we presume, failed to accomplish the objects intended by the legislature. For, by a subsequent act approved May 21, 1885, and which took effect July 1, 1885, entitled "An act for the protection of the public health, and to prevent adulteration of dairy products, and fraud in the sale thereof," it was provided, among other things, as follows:

"Section 1. That no person, firm, or corporate body shall manufacture out of any oleaginous substance, or any compound of the same, other than that produced from unadulterated milk, or of cream from the same, any article designed to take the place of butter or cheese produced from pure, unadulterated milk, or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell, or offer for sale, or have in his, her, or their possession, with intent to sell, the same as an article of food.

"Sec. 2. Every sale of such article or substance which is prohibited by the first section of this act, made after this act shall take effect, is hereby declared to be unlawful and void, and no action shall be maintained in any of the courts in this state to recover upon any contract for the sale of any such article or substance.

"Sec. 3. Every person, company, firm, or corporate body who shall manufacture, sell, or offer or expose for sale, or have in his, her, or their possession with intent to sell, any substance the manufacture and sale of which is prohibited by the first section of this act, shall, for every such offense, forfeit and pay the sum of one hundred dollars, which shall be recoverable, with costs, by any person suing in the name of the commonwealth, as debts of like amount are by law recoverable; one-half of which sum, when so recovered, shall be paid to the proper county treasurer for the use of the county in which suit is brought, and the other half to the person or persons at whose instance such a suit shall or may be commenced and prosecuted to recovery.

"Sec. 4. Every person who violates the provision of the first section of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars, nor more than three hundred, or by imprisonment in the county jail for not less than ten nor more than thirty days, or both such fine and imprisonment, for the first offense, and imprisonment for one year for every subsequent offense."

The plaintiff in error was indicted, under the last statute, in the court of quarter sessions of the peace in Dauphin county, Pa. The charge in the first count of the indictment is that he unlawfully sold, "as an article of food, two cases, containing five pounds each, of an article designed to take the place of butter produced from pure, unadulterated milk, or cream from milk, the said article so sold, as aforesaid, being an article manufactured out of certain oleaginous substances, and compounds of the same, other than that produced from unadulterated milk, or cream from milk, and said article so sold, as aforesaid, being an imitation butter." In the second count the charge is that he unlawfully had in his possession, "with intent to sell the same, as an article of food, a quantity, viz., one hundred pounds, of imitation butter, designed to take the place of butter produced from pure, unadulterated milk, or cream from the same, manufactured out of certain oleaginous substances, or compounds of the same, other than that produced from milk, or cream from the same." It was agreed, for the purposes of the trial, that the defendant on July 10, 1885, in the city of Harrisburg, sold to the prosecuting witness, as an article of food, two original packages of the kind described in the first count; that such packages were sold and bought as "butterine," and not as butter produced from pure, unadulterated milk, or cream from unadulterated milk; and that each of said packages was, at the time of sale, marked with the words, "Oleomargarine Butter," upon the lid and side in

a straight line, in Roman letters half an inch long. It was also agreed that the defendant had in his possession 100 pounds of the same article, with intent to sell it as an article of food. This was the case made by the commonwealth. The defendant then offered to prove by Prof. Hugo Blanck that he saw manufactured the article sold to the prosecuting witness; that it was made from pure animal fats; that the process of manufacture was clean and wholesome, the article containing the same elements as dairy butter, the only difference between them being that the manufactured article contained a smaller proportion of the fatty substance known as "butterine"; that this butterine existed in dairy butter in the proportion of from 3 to 7 per cent., and in the manufactured article in a smaller proportion, and was increased in the latter by the introduction of milk and cream; that, this having been done, the article contained all the elements of butter produced from pure, unadulterated milk, or cream from the same, except that the percentage of butterine was slightly smaller; that the only effect of butterine was to give flavor to the butter, and that it had nothing to do with its wholesomeness; that the oleaginous substances in the manufactured article were substantially identical with those produced from milk or cream; and that the article sold to the prosecuting witness was a wholesome and nutritious article of food, in all respects as wholesome as butter produced from pure, unadulterated milk, or cream from unadulterated milk. The defendant also offered to prove that he was engaged in the grocery and provision business in the city of Harrisburg, and that the article sold by him was part of a large and valuable quantity manufactured prior to the 21st of May, 1885, in accordance with the laws of this commonwealth relating to the manufacture and sale of said article, and so sold by him; that for the purpose of prosecuting that business large investments were made by him in the purchase of suitable real estate, in the erection of proper buildings, and in the purchase of the necessary machinery and ingredients; that in his traffic in said article he made large profits; and, if prevented from continuing it, the value of his property employed therein would be entirely lost, and he be deprived of the means of livelihood. To each offer the commonwealth objected upon the ground that the evidence proposed to be introduced was immaterial and irrelevant. The purpose of these offers of proof was avowed to be (1) to show that the article sold was a new invention, not an adulteration of dairy products, nor injurious to the public health, but wholesome and nutritious as an article of food, and that its manufacture and sale were in conformity to the acts of May 22, 1878, and May 24, 1883; (2) to show that the statute upon which the prosecution was founded was unconstitutional, as not a lawful exercise of police power, and also because it deprived the defendant of the lawful use "of his property, liberty, and faculties, and destroys his property without making compensation." The court sustained the objection to each offer, and excluded the evidence. An exception to that ruling was duly taken by the defendant. A verdict of guilty having been returned, and motions in arrest of judgment and for a new trial having been overruled, the defendant was adjudged to pay a fine of $100 and costs of prosecution, or give bail to pay the same in 10 days, and be in custody until the judgment was performed. That judgment was affirmed by the supreme court of the state. 114 Pa. St. 265, 7 Atl. 913.

This case, in its important aspects, is governed by the principles announced in Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273. It is immaterial to inquire whether the acts with which the defendant is charged were authorized by the statute of May 22, 1878, or by that of May 24, 1883. The present prosecution is founded upon the statute of May 21, 1885; and, if that statute be not in conflict with the constitution of the United States, the judgment of the supreme court of Pennsylvania must be affirmed. It is contended that the last statute is void in that it deprives all coming within its provisions of rights of liberty and property without due process of law, and denies to them the equal protection of the laws,—rights which are secured by the fourteenth amendment of the constitution of the United States. It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the state for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that amendment; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects, and that the fourteenth amendment was not designed to interfere with the exercise of that power by the states. Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273; Union Co. v. Crescent City Co., 111 U. S. 746, 751, 4 Sup. Ct. 652; Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357; Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064. The question, therefore, is whether the prohibition of the manufacture out of oleaginous substances, or out of any compound thereof, other than that produced from unadulterated milk, or cream from unadulterated milk, of an article designed to take the place of butter or cheese produced from pure, unadulterated milk, or cream from unadulterated milk, or the prohibition upon the manufacture of any imitation or adulterated butter or cheese, or upon the selling, or offering for sale, or having in possession with intent to sell, the same, as an article of food, is a lawful exercise by the state of the power to protect, by police reg-

ulations, the public health. The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property as guarantied by the fourteenth amendment. The court assents to this general proposition as embodying a sound principle of constitutional law. But it cannot adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed by the statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, mainly, to protect the public health, and to prevent the adulteration of dairy products, and fraud in the sale thereof, it has, in fact, no real or substantial relation to those objects. Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273. The court is unable to affirm that this legislation has no real or substantial relation to such objects. It will be observed that the offer in the court below was to show by proof that the particular articles the defendant sold, and those in his possession for sale, in violation of the statute, were, in fact, wholesome or nutritious articles of food. It is entirely consistent with that offer that many, indeed that most, kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court cannot say, from anything of which it may take judicial cognizance, that such is not the fact. Under the circumstances disclosed in the record, and in obedience to settled rules of constitutional construction, it must be assumed that such is the fact. "Every possible presumption," Chief Justice Waite said, speaking for the court, in Sinking Fund Cases, 99 U. S. 718, "is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." See also Fletcher v. Peck, 6 Cranch, 128; Dartmouth College v. Woodward, 4 Wheat. 518, 625; Livingston v. Darlington, 101 U. S. 407. Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is or may be conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property, and while, according to the principles upon which our institutions rest, "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself," yet "in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of public opinion, or by means of the suffrage." Yick Wo v. Hopkins, 118 U. S. 370, 6 Sup. Ct. 1064. The case before us belongs to the latter class. The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk, or cream from unadulterated milk, to take the place of butter produced from unadulterated milk, or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committted to another department of government. It is argued in behalf of the defendant that, if the statute in question is sustained as a valid exercise of legislative power, then nothing stands in the way of the destruction, by the legislative department, of the constitutional guaranties of liberty and property. But the possibility of the abuse of legislative power does not disprove its existence. That possibility exists even in reference to powers that are conceded to exist. Besides, the judiciary

department is bound not to give effect to statutory enactments that are plainly forbidden by the constitution. This duty, the court has said, is always one of extreme delicacy, for, apart from the necessity of avoiding conflicts between co-ordinate branches of the government, whether state or national, it is often difficult to determine whether such enactments are within the powers granted to or possessed by the legislature. Nevertheless, if the incompatibility of the constitution and the statute is clear or palpable, the courts must give effect to the former. And such would be the duty of the court if the state legislature, under the pretense of guarding the public health, the public morals, or the public safety, should invade the rights of life, liberty, or property, or other rights secured by the supreme law of the land.

The objection that the statute is repugnant to the clause of the fourteenth amendment forbidding the denial by the state to any person within its jurisdiction of the equal protection of the laws is untenable. The statute places under the same restrictions, and subjects to like penalties and burdens, all who manufacture, or sell, or offer for sale, or keep in possession to sell, the articles embraced by its prohibitions, thus recognizing and preserving the principle of equality among those engaged in the same business. Barbier v. Connolly, supra; Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730; Railway Co. v. Humes, 115 U. S. 519, 6 Sup. Ct. 110.

It is also contended that the act of May 21, 1885, is in conflict with the fourteenth amendment in that it deprives the defendant of his property without that compensation required by law. This contention is without merit, as was held in Mugler v. Kansas, supra.

Upon the whole case, we are of opinion that there is no error in the judgment, and it is therefore affirmed.

WESTERN UNION TEL. CO. v. COMMONWEALTH OF MASSACHUSETTS.

(8 Sup. Ct. 961, 125 U. S. 530.)

Supreme Court of the United States. March 19, 1888.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

George S. Hale, Charles W. Wells, and Willard Brown, for appellant. Andrew J. Waterman and Henry C. Bliss, for appellee.

MILLER, J. This is a writ of error to the circuit court of the United States for the district of Massachusetts. The action was commenced in the supreme judicial court of Massachusetts, sitting in equity, by an information on behalf of the commonwealth, by its attorney general, at the relation of the treasurer thereof, Alanson W. Beard. It was afterwards removed, upon motion of the defendant, the Western Union Telegraph Company, into the circuit court of the United States. The object of the information was to enforce the collection of a tax levied by the proper authorities of the state upon the telegraph company, and to enjoin it from the further operation of its telegraph lines within the territorial limits of the commonwealth until that tax was paid. The defendant company is a corporation organized under the laws of the state of New York, having its capital stock divided into shares. The tax assessed by the treasurer of the commonwealth of Massachusetts was based upon an estimate of $750,952 as the taxable value of the shares of the corporation apportioned to that state, the rate of taxation having been determined for that year, 1885, at $14.14 for and upon each $1,000 of valuation. The mode by which this taxable valuation was arrived at was this: The treasurer ascertained from the officers of the telegraph company that the valuation of its entire capital stock was $47,500,000, from which were deducted the credits proper to be allowed in determining the assessable value, leaving $38,713,924 as the total valuation of said stock liable to taxation. It was then ascertained that the total number of miles of line of said corporation in all the states and territories of this country was 146,052.60, of which 143,219.55 were without the limits of the commonwealth of Massachusetts, leaving 2,833.05 miles within its boundaries. Taking these figures, the treasurer of the state assessed the value of that portion of the capital stock of this company which, under this calculation, would fall within the commonwealth of Massachusetts, at the sum of $750,952. The amount thus arrived at, at the rate of $14.14 upon each $1,000 of valuation, produced the sum of $10,618.46 as the amount of the tax claimed to be due and payable to the treasurer of said commonwealth by that corporation. This sum was demanded of the telegraph company, but it refused to pay the same. The answer of the defendant corporation set up that of its 2,833.05 miles of line within the state of Massachusetts more than 2,334.55 miles were over, under, or across post-roads, made such by the United States, leaving only 498.50 miles not over or along such post-roads, on which the company offered to pay the proportion of the tax assessed according to mileage by the state authorities. The main ground on which the telegraph company resisted the payment of the tax alleged to be due, and on which probably the case was removed from the state court into the circuit court of the United States, is that it is a violation of the rights conferred on the company by the act of July 24, 1866, now title 65, §§ 5263–5269, of the Revised Statutes. The defendant alleges that it had accepted the provisions of that law, and filed a notification of such acceptance with the postmaster general of the United States June 8, 1867. The argument is, therefore, that by virtue of section 5263 the company has a right to exercise its functions of telegraphing over so much of its lines as is connected with the military and post-roads of the United States which have been declared to be such by law without being subject to taxation therefor by the state authorities. That section reads as follows: "Sec. 5263. Any telegraph company now organized, or which may hereafter be organized under the laws of any state, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads."

It is urged that this section, upon its acceptance by this corporation or any of like character, confers a right to do the business of telegraphing which is transacted over the lines so constructed over or along such post-roads without liability to taxation by the state. The argument is very much pressed that it is a tax upon the franchise of the company, which franchise being derived from the United States by virtue of the statute above recited cannot be taxed by a state, and counsel for appellant occasionally speak of the tax authorized by the law of Massachusetts upon this as well as all other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchises. But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the

corporation. The laws of that commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein. The telegraph company, which is the defendant here, derived its franchise to be a corporation and to exercise the function of telegraphing from the state of New York. It owes its existence, its capacity to contract, its right to sue and be sued, and to exercise the business of telegraphy, to the laws of the state under which it is organized. But the privilege of running the lines of its wires "through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States, * * * and over, under, or across the navigable streams or waters of the United States," is granted to it by the act of congress. This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams, or over bridges not built or owned by the federal government, carries with it any exemption from the ordinary burdens of taxation. While the state could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the state for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the congress of the United States, in conferring upon a corporation of one state the authority to enter the territory of any other state and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support. In the case of Telegraph Co. v. Texas, 105 U. S. 460, this question was very fully considered; and while a tax imposed upon every telegram passing over its lines, whether entirely within the state or coming from without its limits, or going from the state out of it, was held to be void so far as related to messages passing through more than one state, as an interference with or a regulation of commerce and with the act of congress we have just been considering, it was distinctly pointed out that if it could be ascertained what telegrams were confined wholly within the state, a tax on those might be imposed by it. In that case the chief justice, delivering the opinion of the court, said: "The Western Union Telegraph Company having accepted the restrictions and obligations of this provision by congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the state is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the state, or sent by public officers on the business of the United States." Pages 464, 465. This authority of the government gives to this telegraph company, as well as to all others of a similar character who accept its provisions, the right to run their lines over the roads and bridges which have been declared to be post-roads of the United States. If the principle now contended for be sound, every railroad in the country should be exempt from taxation because they have all been declared to be post-roads; and the same reasoning would apply with equal force to every bridge and navigable stream throughout the land. And if they were not exempt from the burden of taxation simply because they were post-roads, they would be so relieved whenever a telegraph company chose to make use of one of these roads or bridges along or over which to run its lines. It was to provide against the recognition of such a principle that this court, in the case above cited, while holding that telegrams themselves coming from without a state or sent out of it as a part of their conveyance could not be taxed by the state specifically, nevertheless used the language that "its property in the state is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business." A still stronger case in the same direction is that of Railroad Co. v. Peniston, 18 Wall. 5. The plaintiff in that action, the Union Pacific Railroad Company, was incorporated under a law of the United States. The state of Nebraska, under a revenue law passed by its legislature, undertook to lay a tax upon the property of that company which was used or embraced within the limits of its territory, upon a valuation of $16,000 per mile. The property thus rated and taxed consisted of its road-bed, depots, stations, telegraph poles, wires, bridges, etc. It will be here observed that a part of the valuation on which this tax was levied was made up of the telegraph poles and wires belonging to the company. The argument was pressed in that case that the railroad company held its franchises from the government of the United States, and that its property could not be taxed by the state, but this court held otherwise, and in the opinion used this language: "It is often a difficult question whether a tax imposed by a state does in fact invade the domain of the general government, or interfere with its operations to

such an extent, or in such a manner, as to render it unwarranted. It cannot be that a state tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the constitution. To hold that would be to deny to the states all power to tax persons or property. Every tax levied by a state withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which federal taxes may be laid. The states are, and they must ever be, co-existent with the national government. Neither may destroy the other. Hence the federal constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise." Pages 30, 31. The case of Thomson v. Railroad, 9 Wall. 579, is then cited, where it was held that the property of that company was not exempt from state taxation, though their railroad was a part of a system of roads constructed under the authority and direction of the United States, and largely for the uses and to serve the purposes of the general government. The court further said: "A very large proportion of the property within the states is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the national service. So are steam-boats, horses, stage-coaches, foundries, ship-yards, and multitudes of manufacturing establishments. They are the property of natural persons or of corporations, who are agents or instruments of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the state it is manifest the state governments would be paralyzed. While it is of the utmost importance that all the powers vested by the constitution of the United States in the general government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that state taxation of such property is impliedly prohibited." Page 33. In Bank v. Com., 9 Wall. 353, which was a case of a tax levied upon the shares of a national bank, the same objection in regard to a tax by state authority was pressed upon the court, but this court said that the principle of exemption of federal agencies from state taxation has a limitation growing out of the necessity upon which the principle is founded. "That limitation is, that the agencies of the federal government are only exempted from state legislation so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers into an unauthorized and unjustifiable invasion of the rights of the states. * * * So of the banks. They are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. We do not see the remotest probability of this, in their being required to pay the tax which their stockholders owe to the state for the shares of their capital stock, when the law of the federal government authorizes the tax." Page 362. The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the state of Massachusetts, and the proportion of the length of its lines in that state to their entire length throughout the whole country is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by section 5263 of the Revised Statutes, or by the commerce clause of the constitution.

It is urged against this tax that in ascertaining the value of the stock no deduction is made on account of the value of real estate and machinery situated and subject to local taxation outside of the commonwealth of Massachusetts. The report of Examiner Fiske, to whom the matter was referred to find the facts, states that the amount of the value of said real estate outside of its jurisdiction was not clearly shown, but it did appear that the cost of land and buildings belonging to the company and entirely without that state was over $3,000,000. In the statement of the treasurer of the company it is said that the value of real estate owned by the company within the state of Massachusetts was nothing. Since the corporation was only taxed for that proportion of its shares of capital stock which was supposed to be taxable in that state on the calculation above referred to, and since no real estate of the corporation was owned or taxed within its limits, we do not see why any deduction should be made from the proportion of the capital stock which is taxed by its authorities. But if this were otherwise we do not feel called upon to defend all the items and rules by which they arrived at the taxable value on which its ratio of percentage of taxation

should be assessed; and even in this case, which comes from the circuit court and not from that of the state, we think it should appear that the corporation is injured by some principle or rule of the law not equally applicable to other objects of taxation of like character. Since, therefore, this statute of Massachusetts is intended to govern the taxation of all corporations therein, and doing business within its territory, whether organized under its own laws or those of some other state, and since the principle is one which we cannot pronounce to be an unfair or an unjust one, we do not feel called upon to hold the tax void, because we might have adopted a different system had we been called upon to accomplish the same result. It is very clear to us, when we consider the limited territorial extent of Massachusetts, and the proportion of the length of the lines of this company in that state to its business done therein, with its great population and business activity, that the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries, on which the tax should be assessed, is not unfavorable to the corporation, and that the details of the method by which this was determined have not exceeded the fair range of legislative discretion. We do not think that it follows necessarily, or as a fair argument from the facts stated in the case, that there was injustice in the assessment for taxation. The result of these views is, that the tax assessed against the plaintiff in error is a valid tax; that the judgment of the court below, "that the sum claimed by the plaintiff (below) to be due for taxes, to-wit, $10,618.46, be paid to said state by said corporation, with interest thereon," is without error, and so much of said judgment is hereby affirmed.

The decree or judgment, however, proceeds and awards an injunction against the company in the following language, added to that above extracted: "and that an injunction shall be issued out of and under the seal of this court, directed to said corporation, and its officers, agents, and servants, commanding them and each of them absolutely to desist and refrain from the further prosecution of the business of said corporation until said sums due to the said commonwealth for taxes, as aforesaid, shall have been fully paid, with interest and costs, unless the said sum is paid by said defendant within thirty days from the entry hereof." The effect of this injunction, if obeyed, is to utterly suspend the business of the telegraph company, and defeat all its operations within the state of Massachusetts. The act of congress says that the company accepting its provisions "shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States." It is found in this case that 2,334.55 miles of the company's line, out of 2,833.05 on which this tax is assessed, are along and over such post-roads, and of course the injunction prohibits the operation of the defendant's telegraph over these lines, nearly all it has in the state. If the congress of the United States had authority to say that the company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the state can have no authority to say it shall not be done. The injunction in this case, though ordered by a circuit court of the United States, is only granted by virtue of section 54 of chapter 13 of the Public Statutes of Massachusetts. If this statute is void, as we think it is, so far as it prescribes this injunction as a remedy to enforce the collection of its taxes by the decree of the court awarding it, the injunction is erroneous. In holding this portion of section 54 of chapter 13 of the Massachusetts Statutes to be void as applicable to this case, we do not deprive the state of the power to assess and collect the tax. If a resort to a judicial proceeding to collect it is deemed expedient, there remains to the court all the ordinary means of enforcing its judgment—executions, sequestration, and any other appropriate remedy in chancery.

That part of the decree of the circuit court which awards the injunction is, therefore, reversed, and the case is remanded to that court for further proceedings in conformity to this opinion.

BRADLEY, J., was not present at the argument of this case, and took no part in its decision.

HYLTON v. UNITED STATES.[1]

(3 Dall. 171.)

Supreme Court of the United States. Feb. Term, 1796.

This was an action of debt instituted in the name of the United States against Daniel Hylton to recover the penalty imposed by Act Cong. June 5, 1794, for failure to enter and pay the duty on carriages for the conveyance of persons, kept by the defendant for his own use. The lower court having been equally divided, defendant confessed judgment, by agreement of the parties, and brought error. Affirmed.

Mr. Lee, U. S. Atty. Gen., and Mr. Hamilton, the late secretary of the treasury, in support of the tax. Mr. Campbell, of the Virginia district, and Mr. Ingersoll, Atty. Gen. of Pennsylvania, in opposition.

Mr. Justice CHASE delivered the opinion of the court.

By the case stated, only one question is submitted to the opinion of this court;—whether the law of congress, of the 5th of June, 1794, entitled, "An act to lay duties upon carriages, for the conveyance of persons," is unconstitutional and void?

The principles laid down, to prove the above law void, are these: That a tax on carriages, is a direct tax, and, therefore, by the constitution, must be laid according to the census, directed by the constitution to be taken, to ascertain the number of representatives from each state: And that the tax in question, on carriages, is not laid by that rule of apportionment, but by the rule of uniformity, prescribed by the constitution, in the case of duties, imposts, and excises; and a tax on carriages, is not within either of those descriptions.

By the 2d. section of the 1st. article of the constitution, it is provided, that direct taxes shall be apportioned among the several states, according to their numbers, to be determined by the rule prescribed.

By the 9th section of the same article, it is further provided, that no capitation, or other direct tax, shall be laid, unless in proportion to the census, or enumeration, before directed.

By the 8th section of the same article, it was declared, that congress shall have power to lay and collect taxes, duties, imposts, and excises; but all duties, imposts, and excises, shall be uniform throughout the United States.

As it was incumbent on the plaintiff's counsel in error, so they took great pains to prove, that the tax on carriages was a direct tax; but they did not satisfy my mind. I think, at least, it may be doubted; and if I only doubted, I should affirm the judgment of the circuit court. The deliberate decision of the national legislature, (who did not consider a tax on carriages a direct tax, but thought it was within the description of a duty) would determine me, if the case was doubtful, to receive the construction of the legislature: But I am inclined to think, that a tax on carriages is not a direct tax, within the letter, or meaning, of the constitution.

The great object of the constitution was, to give congress a power to lay taxes, adequate to the exigencies of government; but they were to observe two rules in imposing them, namely, the rule of uniformity, when they laid duties, imposts, or excises; and the rule of apportionment, according to the census, when they laid any direct tax.

If there are any other species of taxes that are not direct, and not included within the words "duties, imposts, or excises," they may be laid by the rule of uniformity, or not: as congress shall think proper and reasonable. If the framers of the constitution did not contemplate other taxes than direct taxes, and duties, imposts, and excises, there is great inaccuracy in their language.—If these four species of taxes were all that were meditated, the general power to lay taxes was unnecessary. If it was intended, that congress should have authority to lay only one of the four above enumerated, to wit, direct taxes, by the rule of apportionment, and the other three by the rule of uniformity, the expressions would have run thus: "Congress shall have power to lay and collect direct taxes, and duties, imposts, and excises; the first shall be laid according to the census; and the three last shall be uniform throughout the United States." The power, in the 8th section of the 1st article, to lay and collect taxes, included a power to lay direct taxes, (whether capitation, or any other) and also duties, imposts, and excises; and every other species or kind of tax whatsoever, and called by any other name. Duties, imposts, and excises, were enumerated, after the general term "taxes," only for the purpose of declaring, that they were to be laid by the rule of uniformity. I consider the constitution to stand in this manner. A general power is given to congress, to lay and collect taxes, of every kind or nature, without any restraint, except only on exports; but two rules are prescribed for their government, namely, uniformity and apportionment: Three kinds of taxes, to wit, duties, imposts, and excises by the first rule, and capitation, or other direct taxes, by the second rule.

I believe some taxes may be both direct and indirect at the same time. If so, would congress be prohibited from laying such a tax, because it is partly a direct tax?

The constitution evidently contemplated no taxes as direct taxes, but only such as congress could lay in proportion to the census. The rule of apportionment is only to be adopted in such cases where it can reasonably apply; and the subject taxed, must ever determine the application of the rule.

If it is proposed to tax any specific article

[1] Opinions of Mr. Justice Patterson, Mr. Justice Wilson, and Mr. Justice Iredell omitted.

by the rule of apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say, that the constitution intended such tax should be laid by that rule.

It appears to me, that a tax on carriages cannot be laid by the rule of apportionment, without very great inequality and injustice. For example: Suppose two states, equal in census, to pay 80,000 dollars each, by a tax on carriages, of 8 dollars on every carriage; and in one state there are 100 carriages, and in the other 1000. The owners of carriages in one state, would pay ten times the tax of owners in the other. A. in one state, would pay for his carriage 8 dollars, but B. in the other state, would pay for his carriage, 80 dollars.

It was argued, that a tax on carriages was a direct tax, and might be laid according to the rule of apportionment, and (as I understood) in this manner: Congress, after determining on the gross sum to be raised was to apportion it, according to the census, and then lay it in one state on carriages, in another on horses, in a third on tobacco, in a fourth on rice; and so on.—I admit that this mode might be adopted, to raise a certain sum in each state, according to the census, but it would not be a tax on carriages, but on a number of specific articles; and it seems to me, that it would be liable to the same objection of abuse and oppression, as a selection of any one article in all the states.

I think, an annual tax on carriages for the conveyance of persons, may be considered as within the power granted to congress to lay duties. The term "duty," is the most comprehensive next to the generical term "tax"; and practically in Great Britain, (whence we take our general ideas of taxes, duties, imposts, excises, customs, &c.) embraces taxes on stamps, tolls for passage, &c. &c. and is not confined to taxes on importation only.

It seems to me, that a tax on expence is an indirect tax; and I think, an annual tax on a carriage for the conveyance of persons, is of that kind; because a carriage is a consumeable commodity; and such annual tax on it, is on the expence of the owner.

I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the constitution, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on land.—I doubt whether a tax, by a general assessment of personal property, within the United States, is included within the term "direct" tax.

As I do not think the tax on carriages is a direct tax, it is unnecessary, at this time, for me to determine, whether this court, constitutionally possesses the power to declare an act of congress void, on the ground of its being made contrary to, and in violation of, the constitution; but if the court have such power, I am free to declare, that I will never exercise it, but in a very clear case.

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Mr. Justice PATTERSON, Mr. Justice WILSON, and Mr. Justice IREDELL, concur.

POLLOCK v. FARMERS' LOAN & TRUST CO. et al.[1]

(15 Sup. Ct. 673, 157 U. S. 429.)

Supreme Court of the United States. April 8, 1895. (No. 893.)

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a bill filed by Charles Pollock, a citizen of the state of Massachusetts, on behalf of himself and all other stockholders of the defendant company similarly situated, against the Farmers' Loan & Trust Company, a corporation of the state of New York, and its directors, alleging that the capital stock of the corporation consisted of $1,000,000, divided into 40,000 shares of the par value of $25 each; that the company was authorized to invest its assets in public stocks and bonds of the United States, of individual states, or of any incorporated city or county, or in such real or personal securities as it might deem proper; and also to take, accept, and execute all such trusts of every description as might be committed to it by any person or persons or any corporation, by grant, assignment, devise, or bequest, or by order of any court of record of New York, and to receive and take any real estate which might be the subject of such trust; that the property and assets of the company amounted to more than $5,000,000, of which at least $1,000,000 was invested in real estate owned by the company in fee, at least $2,000,000 in bonds of the city of New York, and at least $1,000,000 in the bonds and stocks of other corporations of the United States; that the net profits or income of the defendant company during the year ending December 31, 1894, amounted to more than the sum of $300,000 above its actual operating and business expenses, including losses and interest on bonded and other indebtedness; that from its real estate the company derived an income of $50,000 per annum, after deducting all county, state, and municipal taxes; and that the company derived an income or profit of about $60,000 per annum from its investments in municipal bonds.

It was further alleged that under and by virtue of the powers conferred upon the company it had from time to time taken and executed, and was holding and executing, numerous trusts committed to the company by many persons, copartnerships, unincorporated associations, and corporations, by grant, assignment, devise, and bequest, and by orders of various courts, and that the company now held as trustee for many minors, individuals, copartnerships, associations, and corporations, resident in the United States and elsewhere, many parcels of real estate situated in the various states of the United States, and amounting in the aggregate, to a value exceeding $5,000,000, the rents and income of which real estate collected and received by said defendant in its fiduciary capacity annually exceeded the sum of $200,000.

The bill also averred that complainant was, and had been since May 20, 1892, the owner and registered holder of 10 shares of the capital stock of the company, of a value exceeding the sum of $5,000; that the capital stock was divided among a large number of different persons, who, as such stockholders, constituted a large body; that the bill was filed for an object common to them all, and that he therefore brought suit not only in his own behalf as a stockholder of the company, but also as a representative of and on behalf of such of the other stockholders similarly situated and interested as might choose to intervene and become parties.

It was then alleged that the management of the stock, property, affairs, and concerns of the company was committed, under its acts of incorporation, to its directors, and charged that the company and a majority of its directors claimed and asserted that under and by virtue of the alleged authority of the provisions of an act of congress of the United States entitled "An act to reduce taxation, to provide revenue for the government, and for other purposes," passed August 15, 1894, the company was liable, and that they intended to pay, to the United States, before July 1, 1895, a tax of 2 per centum on the net profits of said company for the year ending December 31, 1894, above actual operating and business expenses, including the income derived from its real estate and its bonds of the city of New York; and that the directors claimed and asserted that a similar tax must be paid upon the amount of the incomes, gains, and profits, in excess of $4,000, of all minors and others for whom the company was acting in a fiduciary capacity. And, further, that the company and its directors had avowed their intention to make and file with the collector of internal revenue for the Second district of the city of New York a list, return, or statement showing the amount of the net income of the company received during the year 1894, as aforesaid, and likewise to make and render a list or return to said collector of internal revenue, prior to that date, of the amount of the income, gains and profits of all minors and other persons having incomes in excess of $3,500, for whom the company was acting in a fiduciary capacity.

The bill charged that the provisions in respect of said alleged income tax incorporated in the act of congress were unconstitutional, null, and void, in that the tax was a direct tax in respect of the real estate held and owned by the company in its own right and in its fiduciary capacity as aforesaid, by being imposed upon the rents, issues, and profits of said real estate, and was likewise a direct tax in respect of its personal property and the personal property held by it for others for whom it acted in its fiduciary capac-

[1] Opinion of Mr. Justice Field and dissenting opinion of Mr. Justice Harlan are omitted.

ity as aforesaid, which direct taxes were not, in and by said act, apportioned among the several states, as required by section 2 of article 1 of the constitution; and that, if the income tax so incorporated in the act of congress aforesaid were held not to be a direct tax, nevertheless its provisions were unconstitutional, null, and void, in that they were not uniform throughout the United States, as required in and by section 8 of article 1 of the constitution of the United States, upon many grounds and in many particulars specifically set forth.

The bill further charged that the income-tax provisions of the act were likewise unconstitutional, in that they imposed a tax on incomes not taxable under the constitution, and likewise income derived from the stocks and bonds of the states of the United States, and counties and municipalities therein, which stocks and bonds are among the means and instrumentalities employed for carrying on their respective governments, and are not proper subjects of the taxing power of congress, and which states and their counties and municipalities are independent of the general government of the United States, and the respective stocks and bonds of which are, together with the power of the states to borrow in any form, exempt from federal taxation.

Other grounds of unconstitutionality were assigned, and the violation of articles 4 and 5 of the constitution asserted.

The bill further averred that the suit was not a collusive one, to confer on a court of the United States jurisdiction of the case, of which it would not otherwise have cognizance, and that complainant had requested the company and its directors to omit and refuse to pay said income tax, and to contest the constitutionality of said act, and to refrain from voluntarily making lists, returns, and statements on its own behalf and on behalf of the minors and other persons for whom it was acting in a fiduciary capacity, and to apply to a court of competent jurisdiction to determine its liability under said act; but that the company and a majority of its directors, after a meeting of the directors, at which the matter and the request of complainant were formally laid before them for action, had refused, and still refuse, and intend omitting, to comply with complainant's demand, and had resolved and determined and intended to comply with all and singular the provisions of the said act of congress, and to pay the tax upon all its net profits or income as aforesaid, including its rents from real estate and its income from municipal bonds, and a copy of the refusal of the company was annexed to the complaint.

It was also alleged that if the company and its directors, as they proposed and had declared their intention to do, should pay the tax out of its gains, income, and profits, or out of the gains, income, and profits of the property held by it in its fiduciary capacity, they will diminish the assets of the company and lessen the dividends thereon and the value of the shares; that voluntary compliance with the income-tax provisions would expose the company to a multiplicity of suits, not only by and on behalf of its numerous shareholders, but by and on behalf of numerous minors and others for whom it acts in a fiduciary capacity, and that such numerous suits would work irreparable injury to the business of the company, and subject it to great and irreparable damage, and to liability to the beneficiaries aforesaid, to the irreparable damage of complainant and all its shareholders.

The bill further averred that this was a suit of a civil nature in equity; that the matter in dispute exceeded, exclusive of costs, the sum of $5,000, and arose under the constitution or laws of the United States; and that there was furthermore a controversy between citizens of different states.

The prayer was that it might be adjudged and decreed that the said provisions known as the income tax incorporated in said act of congress passed August 15, 1894, are unconstitutional, null, and void; that the defendants be restrained from voluntarily complying with the provisions of said act, and making the lists, returns, and statements above referred to, or paying the tax aforesaid; and for general relief.

The defendants demurred on the ground of want of equity, and, the cause having been brought on to be heard upon the bill and demurrer thereto, the demurrer was sustained, and the bill of complaint dismissed, with costs, whereupon the record recited that the constitutionality of a law of the United States was drawn in question, and an appeal was allowed directly to this court.

An abstract of the act in question will be found in the margin.[2]

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[2] By sections 27–37 inclusive of the act of congress entitled "An act to reduce taxation, to provide revenue for the government, and for other purposes," received by the president August 15, 1894, and which, not having been returned by him to the house in which it originated within the time prescribed by the constitution of the United States, became a law without approval (28 Stat. 509, c. 349), it was provided that from and after January 1, 1895, and until January 1, 1900, "there shall be assessed, levied, collected, and paid annually upon the gains, profits, and income received in the preceding calendar year by every citizen of the United States, whether residing at home or abroad, and every person residing therein, whether said gains, profits, or income be derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, or from any other source whatever, a tax of two per centum on the amount so derived over and above four thousand dollars, and a like tax shall be levied, collected, and paid annually upon the gains, profits, and income from all property owned and of every business, trade, or profession carried on in the United States by persons residing without the United States. * * *

"Sec. 28. That in estimating the gains, profits, and income of any person there shall be in-

By the third clause of section 2 of article 1 of the constitution it was provided: "Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons." This was amended by the second section of the fourteenth article, declared ratified July 28, 1868, so that the whole number of persons in each state should be counted, Indians not taxed excluded, and the provision, as thus amended, remains in force.

The actual enumeration was prescribed to be made within three years after the first meeting of congress, and within every subsequent term of ten years, in such manner as should be directed.

Section 7 requires "all bills for raising revenue shall originate in the house of representatives."

The first clause of section 8 reads thus: "The congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common

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cluded all income derived from interest upon notes, bonds, and other securities, except such bonds of the United States the principal and interest of which are by the law of their issuance exempt from all federal taxation; profits realized within the year from sales of real estate purchased within two years previous to the close of the year for which income is estimated: interest received or accrued upon all notes, bonds, mortgages, or other forms of indebtedness bearing interest, whether paid or not, if good and collectible, less the interest which has become due from said person or which has been paid by him during the year; the amount of all premium on bonds, notes, or coupons; the amount of sales of live stock, sugar, cotton, wool, butter, cheese, pork, beef, mutton, or other meats, hay, and grain, or other vegetable or other productions, being the growth or produce of the estate of such person, less the amount expended in the purchase or production of said stock or produce, and not including any part thereof consumed directly by the family; money and the value of all personal property acquired by gift or inheritance; all other gains, profits, and income derived from any source whatever except that portion of the salary, compensation, or pay received for services in the civil, military, naval, or other service of the United States, including senators, representatives, and delegates in congress, from which the tax has been deducted, and except that portion of any salary upon which the employer is required by law to withhold, and does withhold the tax and pays the same to the officer authorized to receive it. In computing incomes the necessary expenses actually incurred in carrying on any business, occupation, or profession shall be deducted and also all interest due or paid within the year by such person on existing indebtedness. And all national, state, county, school, and municipal taxes, not including those assessed against local benefits, paid within the year shall be deducted from the gains, profits, or income of the person who has actually paid the same, whether such person be owner, tenant, or mortgagor; also losses actually sustained during the year, incurred in trade or arising from fires, storms, or shipwreck, and not compensated for by insurance or otherwise, and debts ascertained to be worthless, but excluding all estimated depreciation of values and losses within the year on sales of real estate purchased within two years previous to the year for which income is estimated: provided, that no deduction shall be made for any amount paid out for new buildings, permanent improvements, or betterments, made to increase the value of any property or estate: provided further, that only one deduction of four thousand dollars shall be made from the aggregate income of all the members of any family, composed of one or both parents, and one or more minor children, or husband and wife: that guardians shall be allowed to make a deduction in favor of each and every ward, except that in case where two or more wards are comprised in one family, and have joint property interests, the aggregate deduction in their favor shall not exceed four thousand dollars: and provided further, that in cases where the salary or other compensation paid to any person in the employment or service of the United States shall not exceed the rate of four thousand dollars per annum, or shall be by fees, or uncertain or irregular in the amount or in the time during which the same shall have accrued or been earned, such salary or other compensation shall be included in estimating the annual gains, profits, or income of the person to whom the same shall have been paid, and shall include that portion of any income or salary upon which a tax has not been paid by the employer, where the employer is required by law to pay on the excess over four thousand dollars: provided also, that in computing the income of any person, corporation, company, or association there shall not be included the amount received from any corporation, company, or association as dividends upon the stock of such corporation, company, or association if the tax of two per centum has been paid upon its net profits by said corporation, company, or association as required by this act.

"Sec. 29. That it shall be the duty of all persons of lawful age having an income of more than three thousand five hundred dollars for the taxable year, computed on the basis herein prescribed, to make and render a list or return, on or before the day provided by law, in such form and manner as may be directed by the commissioner of internal revenue, with the approval of the secretary of the treasury, to the collector or a deputy collector of the district in which they reside, of the amount of their income, gains, and profits, as aforesaid; and all guardians and trustees, executors, administrators, agents, receivers, and all persons or corporations acting in any fiduciary capacity, shall make and render a list or return, as aforesaid, to the collector or a deputy collector of the district in which such person or corporation acting in a fiduciary capacity resides or does business, of the amount of income, gains, and profits of any minor or person for whom they act, but persons having less than three thousand five hundred dollars income are not required to make such report; and the collector or deputy collector, shall require every list or return to be verified by the oath or affirmation of the party rendering it, and may increase the amount of any list or return if he has reason to believe that the same is understated; and in case any such person having a taxable income shall neglect or refuse to make and render such list and return, or shall render a willfully false or fraudulent list or return, it shall be the duty of the collector or deputy collector, to make such list, according to the best information he can obtain, by the examination of such person, or any other evidence, and to add fifty per centum as a penalty to the amount of the tax due on such list in all cases of willful neglect or refusal to make and render a list or return; and in all cases of a willfully false or fraudulent list or return having been rendered to add one hundred per centum as a penalty to the amount of tax ascertained to be due, the tax

defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." And the third clause thus: "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The fourth, fifth, and sixth clauses of section 9 are as follows:

"No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

"No tax or duty shall be laid on articles exported from any state.

"No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties in another."

It is also provided by the second clause of section 10 that "no state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws"; and, by the third clause,

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and the additions thereto as a penalty to be assessed and collected in the manner provided for in other cases of willful neglect or refusal to render a list or return, or of rendering a false or fraudulent return." A proviso was added that any person or corporation might show that he or its ward had no taxable income, or that the same had been paid elsewhere, and the collector might exempt from the tax for that year. "Any person or company, corporation, or association feeling aggrieved by the decision of the deputy collector, in such cases may appeal to the collector of the district, and his decision thereon, unless reversed by the commissioner of internal revenue, shall be final. If dissatisfied with the decision of the collector such person or corporation, company, or association may submit the case, with all the papers, to the commissioner of internal revenue for his decision, and may furnish the testimony of witnesses to prove any relevant facts having served notice to that effect upon the commissioner of internal revenue, as herein prescribed." Provision was made for notice of time and place for taking testimony on both sides, and that no penalty should be assessed until after notice.

By section 30, the taxes on incomes were made payable on or before July 1st of each year, and 5 per cent. penalty levied on taxes unpaid, and interest.

By section 31, any non-resident might receive the benefit of the exemptions provided for, and "in computing income he shall include all income from every source, but unless he be a citizen of the United States he shall only pay on that part of the income which is derived from any source in the United States. In case such non-resident fails to file such statement, the collector of each district shall collect the tax on the income derived from property situated in his district, subject to income tax, making no allowance for exemptions, and all property belonging to such non-resident shall be liable to distraint for tax: provided, that non-resident corporations shall be subject to the same laws as to tax as resident corporations, and the collection of the tax shall be made in the same manner as provided for collections of taxes against non-resident persons."

"Sec. 32. That there shall be assessed, levied, and collected, except as herein otherwise provided, a tax of two per centum annually on the net profits or income above actual operating and business expenses, including expenses for materials purchased for manufacture or bought for resale, losses, and interest on bonded and other indebtedness of all banks, banking institutions, trust companies, saving institutions, fire, marine, life, and other insurance companies, railroad, canal, turnpike, canal navigation, slack water, telephone, telegraph, express, electric light, gas, water, street railway companies, and all other corporations, companies, or associations doing business for profit in the United States, no matter how created and organized but not including partnerships."

The tax is made payable "on or before the first day of July in each year; and if the president or other chief officer of any corporation, company, or association, or in the case of any foreign corporation, company, or association, the resident manager or agent shall neglect or refuse to file with the collector of the internal revenue district in which said corporation, company, or association shall be located or be engaged in business, a statement verified by his oath or affirmation, in such form as shall be prescribed by the commissioner of internal revenue, with the approval of the secretary of the treasury, showing the amount of net profits or income received by said corporation, company, or association during the whole calendar year last preceding the date of filing said statement as hereinafter required, the corporation, company, or association making default shall forfeit as a penalty the sum of one thousand dollars and two per centum on the amount of taxes due, for each month until the same is paid, the payment of said penalty to be enforced as provided in other cases of neglect and refusal to make return of taxes under the internal revenue laws.

"The net profits or income of all corporations, companies, or associations shall include the amounts paid to shareholders, or carried to the account of any fund, or used for construction, enlargement of plant, or any other expenditure or investment paid from the net annual profits made or acquired by said corporations, companies, or associations.

"That nothing herein contained shall apply to states, counties, or municipalities; nor to corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes, including fraternal beneficiary societies, orders, or associations operating upon the lodge system and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations and dependents of such members; nor to the stocks, shares, funds, or securities held by any fiduciary or trustee for charitable, religious, or educational purposes; nor to building and loan associations or companies which make loans only to their shareholders; nor to such savings banks, savings institutions or societies as shall, first, have no stockholders or members except depositors and no capital except deposits; secondly, shall not receive deposits to an aggregate amount, in any one year, of more than one thousand dollars from the same depositor; thirdly, shall not allow an accumulation or total of deposits, by any one depositor, exceeding ten thousand dollars; fourthly, shall actually divide and distribute to its depositors, ratably to deposits, all the earnings over the necessary and proper expenses of such bank, institution, or society, except such as shall be applied to surplus; fifthly, shall not possess, in any form, a surplus fund exceeding ten per centum of its aggregate deposits; nor to such savings banks, savings institutions, or societies composed of members who do not participate in the profits thereof and which pay interest or dividends only to their depositors; nor to that part of the business of any savings bank, institution, or other similar association having a capital stock, that is conducted on the mutual plan solely for the benefit of its depositors on such plan, and which shall keep its accounts of its business conducted

that "no state shall, without the consent of congress, lay any duty of tonnage."

The first clause of section 9 provides: "The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importations, not exceeding ten dollars for each person."

Article 5 prescribes the mode for the amendment of the constitution, and concludes with this proviso: "Provided, that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article."

Jos. H. Choate, C. A. Seward, B. H. Bristow, Wm. D. Guthrie, David Willcox, Charles Steele, and Charles F. Southmayd, for appellants Pollock and Hyde. Herbert B. Turner, for appellee Farmers' Loan & Trust Company. James C. Carter, Wm. C. Gulliver, and F. B. Candler, for appellee Continental

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on such mutual plan separate and apart from its other accounts.

"Nor to any insurance company or association which conducts all its business solely upon the mutual plan, and only for the benefit of its policy holders or members, and having no capital stock and no stock or shareholders, and holding all its property in trust and in reserve for its policy holders or members; nor to that part of the business of any insurance company having a capital stock and stock and shareholders, which is conducted on the mutual plan, separate from its stock plan of insurance, and solely for the benefit of the policy holders and members insured on said mutual plan, and holding all the property belonging to and derived from said mutual part of its business in trust and reserve for the benefit of its policy holders and members insured on said mutual plan.

"That all state, county, municipal, and town taxes paid by corporations, companies, or associations, shall be included in the operating and business expenses of such corporations, companies, or associations.

"Sec. 33. That there shall be levied, collected, and paid on all salaries of officers, or payments for services to persons in the civil, military, naval, or other employment or service of the United States, including senators and representatives and delegates in congress, when exceeding the rate of four thousand dollars per annum, a tax of two per centum on the excess above the said four thousand dollars; and it shall be the duty of all paymasters and all disbursing officers under the government of the United States, or persons in the employ thereof, when making any payment to any officers or persons as aforesaid, whose compensation is determined by a fixed salary, or upon settling or adjusting the accounts of such officers or persons, to deduct and withhold the aforesaid tax of two per centum; and the pay roll, receipts, or account of officers or persons paying such tax as aforesaid shall be made to exhibit the fact of such payment. And it shall be the duty of the accounting officers of the treasury department, when auditing the accounts of any paymaster or disbursing officer, or any officer withholding his salary from moneys received by him, or when settling or adjusting the accounts of any such officer, to require evidence that the taxes mentioned in this section have been deducted and paid over to the treasurer of the United States, or other officer authorized to receive the same. Every corporation which pays to any employé a salary or compensation exceeding four thousand dollars per annum shall report the same to the collector or deputy collector of his district and said employé shall pay thereon, subject to the exemptions herein provided for, the tax of two per centum on the excess of his salary over four thousand dollars: provided, that salaries due to state, county, or municipal officers shall be exempt from the income tax herein levied."

By section 34, sections 3167, 3172, 3173, and 3176 of the Revised Statutes of the United States as amended were amended so as to provide that it should be unlawful for the collector and other officers to make known, or to publish, amount or source of income, under penalty; that every collector should "from time to time cause his deputies to proceed through every part of his district and inquire after and concerning all persons therein who are liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects liable to pay any tax, and to make a list of such persons and enumerate said objects"; that the tax returns must be made on or before the first Monday in March; that the collectors may make returns when particulars are furnished; that notice be given to absentees to render returns; that collectors may summon persons to produce books and testify concerning returns; that collectors may enter other districts to examine persons and books, and may make returns; and that penalties may be imposed on false returns.

By section 35 it was provided that corporations doing business for profit should make returns on or before the first Monday of March of each year "of all the following matters for the whole calendar year last preceding the date of such return:

"First. The gross profits of such corporation, company, or association, from all kinds of business of every name and nature.

"Second. The expenses of such corporation, company, or association, exclusive of interest, annuities, and dividends.

"Third. The net profits of such corporation, company, or association, without allowance for interest, annuities, or dividends.

"Fourth. The amount paid on account of interest, annuities, and dividends, stated separately.

"Fifth. The amount paid in salaries of four thousand dollars or less to each person employed.

"Sixth. The amount paid in salaries of more than four thousand dollars to each person employed and the name and address of each of such persons and the amount paid to each."

By section 36, that books of account should be kept by corporations as prescribed, and inspection thereof be granted under penalty.

By section 37 provision is made for receipts for taxes paid.

By a joint resolution of February 21, 1895, the time for making returns of income for the year 1894 was extended, and it was provided that "in computing incomes under said act the amounts necessarily paid for fire insurance premiums and for ordinary repairs shall be deducted"; and that "in computing incomes under said act the amounts received as dividends upon the stock of any corporation, company or association shall not be included in case such dividends are also liable to the tax of two per centum upon the net profits of said corporation, company or association, although such tax may not have been actually paid by said corporation, company or association at the time of making returns by the person, corporation or association receiving such dividends, and returns or reports of the names and salaries of employés shall not be required from employers unless called for by the collector in order to verify the returns of employés."

Trust Company. Attorney General Olney and Assistant Attorney General Whitney, for the United States.

Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

The jurisdiction of a court of equity to prevent any threatened breach of trust in the misapplication or diversion of the funds of a corporation by illegal payments out of its capital or profits has been frequently sustained. Dodge v. Woolsey, 18 How. 331; Hawes v. Oakland, 104 U. S. 450.

As in Dodge v. Woolsey, this bill proceeds on the ground that the defendants would be guilty of such breach of trust or duty in voluntarily making returns for the imposition of, and paying, an unconstitutional tax; and also on allegations of threatened multiplicity of suits and irreparable injury.

The objection of adequate remedy at law was not raised below, nor is it now raised by appellees, if it could be entertained at all at this stage of the proceedings; and, so far as it was within the power of the government to do so, the question of jurisdiction, for the purposes of the case, was explicitly waived on the argument. The relief sought was in respect of voluntary action by the defendant company, and not in respect of the assessment and collection themselves. Under these circumstances, we should not be justified in declining to proceed to judgment upon the merits. Pelton v. Bank, 101 U. S. 143, 148; Cummings v. Bank, Id. 153, 157; Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. 486.

Since the opinion in Marbury v. Madison, 1 Cranch, 137, 177, was delivered, it has not been doubted that it is within judicial competency, by express provisions of the constitution or by necessary inference and implication, to determine whether a given law of the United States is or is not made in pursuance of the constitution, and to hold it valid or void accordingly. "If," said Chief Justice Marshall, "both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." And the chief justice added that the doctrine "that courts must close their eyes on the constitution, and see only the law," "would subvert the very foundation of all written constitutions." Necessarily the power to declare a law unconstitutional is always exercised with reluctance; but the duty to do so, in a proper case, cannot be declined, and must be discharged in accordance with the deliberate judgment of the tribunal in which the validity of the enactment is directly drawn in question.

The contention of the complainant is:

First. That the law in question, in imposing a tax on the income or rents of real estate, imposes a tax upon the real estate itself; and in imposing a tax on the interest or other income of bonds or other personal property, held for the purposes of income or ordinarily yielding income, imposes a tax upon the personal estate itself; that such tax is a direct tax, and void because imposed without regard to the rule of apportionment; and that by reason thereof the whole law is invalidated.

Second. That the law is invalid, because imposing indirect taxes in violation of the constitutional requirement of uniformity, and therein also in violation of the implied limitation upon taxation that all tax laws must apply equally, impartially, and uniformly to all similarly situated. Under the second head, it is contended that the rule of uniformity is violated, in that the law taxes the income of certain corporations, companies, and associations, no matter how created or organized, at a higher rate than the incomes of individuals or partnerships derived from precisely similar property or business; in that it exempts from the operation of the act and from the burden of taxation numerous corporations, companies, and associations having similar property and carrying on similar business to those expressly taxed; in that it denies to individuals deriving their income from shares in certain corporations, companies, and associations the benefit of the exemption of $4,000 granted to other persons interested in similar property and business; in the exemption of $4,000; in the exemption of building and loan associations, savings banks, mutual life, fire, marine, and accident insurance companies, existing solely for the pecuniary profit of their members,—these and other exemptions being alleged to be purely arbitrary and capricious, justified by no public purpose, and of such magnitude as to invalidate the entire enactment; and in other particulars.

Third. That the law is invalid so far as imposing a tax upon income received from state and municipal bonds.

The constitution provides that representatives and direct taxes shall be apportioned among the several states according to numbers, and that no direct tax shall be laid except according to the enumeration provided for; and also that all duties, imposts, and excises shall be uniform throughout the United States.

The men who framed and adopted that instrument had just emerged from the struggle for independence whose rallying cry had been that "taxation and representation go together."

The mother country had taught the colonists, in the contests waged to establish that taxes could not be imposed by the sovereign except as they were granted by the representatives of the realm, that self-taxation constituted the main security against oppression. As Burke declared, in his speech on conciliа-

tion with America, the defenders of the excellence of the English constitution "took infinite pains to inculcate, as a fundamental principle, that, in all monarchies, the people must, in effect, themselves, mediately or immediately, possess the power of granting their own money, or no shadow of liberty could subsist." The principle was that the consent of those who were expected to pay it was essential to the validity of any tax.

The states were about, for all national purposes embraced in the constitution, to become one, united under the same sovereign authority, and governed by the same laws. But as they still retained their jurisdiction over all persons and things within their territorial limits, except where surrendered to the general government or restrained by the constitution, they were careful to see to it that taxation and representation should go together, so that the sovereignty reserved should not be impaired, and that when congress, and especially the house of representatives, where it was specifically provided that all revenue bills must originate, voted a tax upon property, it should be with the consciousness, and under the responsibility, that in so doing the tax so voted would proportionately fall upon the immediate constituents of those who imposed it.

More than this, by the constitution the states not only gave to the nation the concurrent power to tax persons and property directly, but they surrendered their own power to levy taxes on imports and to regulate commerce. All the 13 were seaboard states, but they varied in maritime importance, and differences existed between them in population, in wealth, in the character of property and of business interests. Moreover, they looked forward to the coming of new states from the great West into the vast empire of their anticipations. So when the wealthier states as between themselves and their less favored associates, and all as between themselves and those who were to come, gave up for the common good the great sources of revenue derived through commerce, they did so in reliance on the protection afforded by restrictions on the grant of power.

Thus, in the matter of taxation, the constitution recognizes the two great classes of direct and indirect taxes, and lays down two rules by which their imposition must be governed, namely, the rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts, and excises.

The rule of uniformity was not prescribed to the exercise of the power granted by the first paragraph of section 8 to lay and collect taxes, because the rule of apportionment as to taxes had already been laid down in the third paragraph of the second section.

And this view was expressed by Mr. Chief Justice Chase in The License Tax Cases, 5 Wall. 462, 471, when he said: "It is true that the power of congress to tax is a very extensive power. It is given in the constitution with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion."

And although there have been, from time to time, intimations that there might be some tax which was not a direct tax, nor included under the words "duties, imports, and excises," such a tax, for more than 100 years of national existence, has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue.

The first question to be considered is whether a tax on the rents or income of real estate is a direct tax within the meaning of the constitution. Ordinarily, all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes. Nevertheless, it may be admitted that, although this definition of direct taxes is prima facie correct, and to be applied in the consideration of the question before us, yet that the constitution may bear a different meaning, and that such different meaning must be recognized. But in arriving at any conclusion upon this point we are at liberty to refer to the historical circumstances attending the framing and adoption of the constitution, as well as the entire frame and scheme of the instrument, and the consequences naturally attendant upon the one construction or the other.

We inquire, therefore, what, at the time the constitution was framed and adopted, were recognized as direct taxes? What did those who framed and adopted it understand the terms to designate and include?

We must remember that the 55 members of the constitutional convention were men of great sagacity, fully conversant with governmental problems, deeply conscious of the nature of their task, and profoundly convinced that they were laying the foundations of a vast future empire. "To many in the assembly the work of the great French magistrate on the 'Spirit of Laws,' of which Washington with his own hand had copied an abstract by Madison, was the favorite manual. Some of them had made an analysis of all federal governments in ancient and modern times, and a few were well versed in the best English, Swiss, and Dutch writers on government. They had immediately before them the example of Great Britain, and they had a still better school of political wisdom in the republican constitutions of their several states, which many of them had assisted to frame." 2 Bancr. Hist. Const. 9.

The Federalist demonstrates the value attached by Hamilton, Madison, and Jay to

historical experience, and shows that they had made a careful study of many forms of government. Many of the framers were particularly versed in the literature of the period,—Franklin, Wilson, and Hamilton for example. Turgot had published in 1764 his work on taxation, and in 1766 his essay on "The Formation and Distribution of Wealth," while Adam Smith's "Wealth of Nations" was published in 1776. Franklin, in 1766, had said, upon his examination before the house of commons, that: "An external tax is a duty laid on commodities imported; that duty is added to the first cost and other charges on the commodity, and, when it is offered to sale, makes a part of the price. If the people do not like it at that price, they refuse it. They are not obliged to pay it. But an internal tax is forced from the people without their consent, if not laid by their own representatives. The stamp act says we shall have no commerce, make no exchange of property with each other, neither purchase nor grant, nor recover debts; we shall neither marry nor make our wills,—unless we pay such and such sums; and thus it is intended to extort our money from us, or ruin us by the consequences of refusing to pay." 16 Parl. Hist. 144.

They were, of course, familiar with the modes of taxation pursued in the several states. From the report of Oliver Wolcott, when secretary of the treasury, on direct taxes, to the house of representatives, December 14, 1796,—his most important state paper (Am. St. P. 1 Finance, 431),—and the various state laws then existing, it appears that prior to the adoption of the constitution nearly all the states imposed a poll tax, taxes on land, on cattle of all kinds, and various kinds of personal property, and that, in addition, Massachusetts, Connecticut, Pennsylvania, Delaware, New Jersey, Virginia, and South Carolina assessed their citizens upon their profits from professions, trades, and employments.

Congress, under the articles of confederation, had no actual operative power of taxation. It could call upon the states for their respective contributions or quotas as previously determined on; but, in case of the failure or omission of the states to furnish such contribution, there were no means of compulsion, as congress had no power whatever to lay any tax upon individuals. This imperatively demanded a remedy; but the opposition to granting the power of direct taxation in addition to the substantially exclusive power of laying imposts and duties was so strong that it required the convention, in securing effective powers of taxation to the federal government, to use the utmost care and skill to so harmonize conflicting interests that the ratification of the instrument could be obtained.

The situation and the result are thus described by Mr. Chief Justice Chase in Lane Co. v. Oregon, 7 Wall. 71, 76: "The people of the United States constitute one nation, under one government; and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence. The states disunited might continue to exist. Without the states in union, there could be no such political body as the United States. Both the states and the United States existed before the constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the confederate government, which acted, with powers greatly restricted, only upon the states. But in many articles of the constitution the necessary existence of the states, and, within their proper spheres, the independent authority of the states, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved. The general condition was well stated by Mr. Madison in the Federalist, thus: 'The federal and state governments are in fact but different agents and trustees of the people, constituted with different powers, and designated for different purposes.' Now, to the existence of the states, themselves necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function of government. It was exercised by the colonies; and when the colonies became states, both before and after the formation of the confederation, it was exercised by the new governments. Under the articles of confederation the government of the United States was limited in the exercise of this power to requisitions upon the states, while the whole power of direct and indirect taxation of persons and property, whether by taxes on polls, or duties on imports, or duties on internal production, manufacture, or use, was acknowledged to belong exclusively to the states, without any other limitation than that of noninterference with certain treaties made by congress. The constitution, it is true, greatly changed this condition of things. It gave the power to tax, both directly and indirectly, to the national government, and, subject to the one prohibition of any tax upon exports, and to the condition of uniformity in respect to indirect, and of proportion in respect to direct, taxes, the power was given without any express reservation. On the other hand, no power to tax exports, or imports except for a single purpose and to an insignificant extent, or to lay any duty on tonnage, was permitted to the states. In respect, however, to property, business, and persons, within their respective limits, their power of taxation remained and remains entire. It is, indeed, a

concurrent power, and in the case of a tax on the same subject by both governments the claim of the United States, as the supreme authority, must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the states commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the state constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the national government. There is nothing in the constitution which contemplates or authorizes any direct abridgment of this power by national legislation. To the extent just indicated it is as complete in the states as the like power, within the limits of the constitution, is complete in congress."

On May 29, 1787, Charles Pinckney presented his draft of a proposed constitution, which provided that the proportion of direct taxes should be regulated by the whole number of inhabitants of every description, taken in the manner prescribed by the legislature, and that no tax should be paid on articles exported from the United States. 1 Elliot, Deb. 147, 148.

Mr. Randolph's plan declared "that the right of suffrage, in the national legislature, ought to be proportioned to the quotas of contribution, or to the number of free inhabitants, as the one or the other may seem best, in different cases." 1 Elliot, Deb. 143.

On June 15, Mr. Paterson submitted several resolutions, among which was one proposing that the United States in congress should be authorized to make requisitions in proportion to the whole number of white and other free citizens and inhabitants, including those bound to servitude for a term of years, and three-fifths of all other persons, except Indians not taxed. 1 Elliot, Deb. 175, 176.

On the 9th of July, the proposition that the legislature be authorized to regulate the number of representatives according to wealth and inhabitants was approved, and on the 11th it was voted that, "in order to ascertain the alterations that may happen in the population and wealth of the several states, a census shall be taken," although the resolution of which this formed a part was defeated. 5 Elliot, Deb. 288, 295; 1 Elliot, Deb. 200.

On July 12th, Gov. Morris moved to add to the clause empowering the legislature to vary the representation according to the amount of wealth and number of the inhabitants a proviso that taxation should be in proportion to representation, and, admitting that some objections lay against his proposition, which would be removed by limiting it to direct taxation, since "with regard to indirect taxes on exports and imports, and on consumption, the rule would be inapplicable," varied his motion by inserting the word "direct," whereupon it passed as follows: "Provided, always, that direct taxation ought to be proportioned to representation." 5 Elliot, Deb. 302.

Amendments were proposed by Mr. Ellsworth and Mr. Wilson to the effect that the rule of contribution by direct taxation should be according to the number of white inhabitants and three-fifths of every other description, and that, in order to ascertain the alterations in the direct taxation which might be required from time to time, a census should be taken. The word "wealth" was struck out of the clause on motion of Mr. Randolph; and the whole proposition, proportionate representation to direct taxation, and both to the white and three-fifths of the colored inhabitants, and requiring a census, was adopted.

In the course of the debates, and after the motion of Mr. Ellsworth that the first census be taken in three years after the meeting of congress had been adopted, Mr. Madison records: "Mr. King asked what was the precise meaning of 'direct taxation.' No one answered." But Mr. Gerry immediately moved to amend by the insertion of the clause that "from the first meeting of the legislature of the United States until a census shall be taken, all moneys for supplying the public treasury by direct taxation shall be raised from the several states according to the number of their representatives respectively in the first branch." This left for the time the matter of collection to the states. Mr. Langdon objected that this would bear unreasonably hard against New Hampshire, and Mr. Martin said that direct taxation should not be used but in cases of absolute necessity, and then the states would be the best judges of the mode. 5 Elliot, Deb. 451, 453.

Thus was accomplished one of the great compromises of the constitution, resting on the doctrine that the right of representation ought to be conceded to every community on which a tax is to be imposed, but crystallizing it in such form as to allay jealousies in respect of the future balance of power; to reconcile conflicting views in respect of the enumeration of slaves; and to remove the objection that, in adjusting a system of representation between the states, regard should be had to their relative wealth, since those who were to be most heavily taxed ought to have a proportionate influence in the government.

The compromise, in embracing the power of direct taxation, consisted not simply in including part of the slaves in the enumeration of population, but in providing that, as between state and state, such taxation should be proportioned to representation. The establishment of the same rule for the apportionment of taxes as for regulating the proportion of representatives, observed Mr. Madison in No. 54 of the Federalist, was by no means founded on the same principle, for,

as to the former, it had reference to the proportion of wealth, and, although in respect of that it was in ordinary cases a very unfit measure, it "had too recently obtained the general sanction of America not to have found a ready preference with the convention," while the opposite interests of the states, balancing each other, would produce impartiality in enumeration. By prescribing this rule, Hamilton wrote (Federalist, No. 36) that the door was shut "to partiality or oppression," and "the abuse of this power of taxation to have been provided against with guarded circumspection"; and obviously the operation of direct taxation on every state tended to prevent resort to that mode of supply except under pressure of necessity, and to promote prudence and economy in expenditure.

We repeat that the right of the federal government to directly assess and collect its own taxes, at least until after requisitions upon the states had been made and failed, was one of the chief points of conflict; and Massachusetts, in ratifying, recommended the adoption of an amendment in these words: "That congress do not lay direct taxes but when the moneys arising from the impost and excise are insufficient for the public exigencies, nor then until congress shall have first made a requisition upon the states to assess, levy, and pay their respective proportions of such requisition, agreeably to the census fixed in the said constitution, in such way and manner as the legislatures of the states shall think best." 1 Elliot, Deb. 322. And in this South Carolina, New Hampshire, and Rhode Island concurred. Id. 325, 326, 329, 336.

Luther Martin, in his well known communication to the legislature of Maryland in January, 1788, expressed his views thus: "By the power to lay and collect taxes they may proceed to direct taxation on every individual, either by a capitation tax on their heads, or an assessment on their property. * * * Many of the members, and myself in the number, thought that the states were much better judges of the circumstances of their citizens, and what sum of money could be collected from them by direct taxation, and of the manner in which it could be raised with the greatest ease and convenience to their citizens, than the general government could be; and that the general government ought not to have the power of laying direct taxes in any case but in that of the delinquency of a state." 1 Elliot, Deb. 344, 368, 369.

Ellsworth and Sherman wrote the governor of Connecticut, September 26, 1787, that it was probable "that the principal branch of revenue will be duties on imports. What may be necessary to be raised by direct taxation is to be apportioned on the several states, according to the number of their inhabitants; and although congress may raise the money by their own authority, if necessary, yet that authority need not be exercised if each state will furnish its quota." 1 Elliot, Deb. 492.

And Ellsworth, in the Connecticut convention, in discussing the power of congress to lay taxes, pointed out that all sources of revenue, excepting the impost, still lay open to the states, and insisted that it was "necessary that the power of the general legislature should extend to all the objects of taxation, that government should be able to command all the resources of the country, because no man can tell what our exigencies may be. Wars have now become rather wars of the purse than of the sword. Government must therefore be able to command the whole power of the purse. * * * Direct taxation can go but little way towards raising a revenue. To raise money in this way, people must be provident; they must constantly be laying up money to answer the demands of the collector. But you cannot make people thus provident. If you would do anything to the purpose, you must come in when they are spending, and take a part with them. * * * All nations have seen the necessity and propriety of raising a revenue by indirect taxation, by duties upon articles of consumption. * * * In England the whole public revenue is about twelve millions sterling per annum. The land tax amounts to about two millions; the window and some other taxes, to about two millions more. The other eight millions are raised upon articles of consumption. * * * This constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void." 2 Elliot, Deb. 191, 192, 196.

In the convention of Massachusetts by which the constitution was ratified, the second section of article 1 being under consideration, Mr. King said: "It is a principle of this constitution that representation and taxation should go hand in hand. * * * By this rule are representation and taxation to be apportioned. And it was adopted, because it was the language of all America. According to the Confederation, ratified in 1781, the sums for the general welfare and defense should be apportioned according to the surveyed lands, and improvements thereon, in the several states; but that it hath never been in the power of congress to follow that rule, the returns from the several states being so very imperfect." 2 Elliot, Deb. 36.

Theophilus Parsons observed: "Congress have only a concurrent right with each state in laying direct taxes, not an exclusive right; and the right of each state to direct taxation is equally extensive and perfect as the

right of congress." 2 Elliot, Deb. 93. And John Adams, Dawes, Sumner, King, and Sedgwick all agreed that a direct tax would be the last source of revenue resorted to by congress.

In the New York convention, Chancellor Livingston pointed out that, when the imposts diminished and the expenses of the government increased, "they must have recourse to direct taxes; that is, taxes on land and specific duties." 2 Elliot, Deb. 341. And Mr. Jay, in reference to an amendment that direct taxes should not be imposed until requisition had been made and proved fruitless, argued that the amendment would involve great difficulties, and that it ought to be considered that direct taxes were of two kinds,—general and specific. Id. 380, 381.

In Virginia, Mr. John Marshall said: "The objects of direct taxes are well understood. They are but few. What are they? Lands, slaves, stock of all kinds, and a few other articles of domestic property. * * * They will have the benefit of the knowledge and experience of the state legislature. They will see in what manner the legislature of Virginia collects its taxes. * * * Cannot congress regulate the taxes so as to be equal on all parts of the community? Where is the absurdity of having thirteen revenues? Will they clash with or injure each other? If not, why cannot congress make thirteen distinct laws, and impose the taxes on the general objects of taxation in each state, so as that all persons of the society shall pay equally, as they ought? 3 Elliot, Deb. 229, 235. At that time, in Virginia, lands were taxed, and specific taxes assessed on certain specified objects. These objects were stated by Sec. Wolcott to be taxes on lands, houses in towns, slaves, stud horses, jackasses, other horses and mules, billiard tables, four-wheeled riding carriages, phaetons, stage wagons, and riding carriages with two wheels; and it was undoubtedly to these objects that the future chief justice referred.

Mr. Randolph said: "But in this new constitution there is a more just and equitable rule fixed,—a limitation beyond which they cannot go. Representatives and taxes go hand in hand. According to the one will the other be regulated. The number of representatives is determined by the number of inhabitants. They have nothing to do but to lay taxes accordingly." 3 Elliot, Deb. 121.

Mr. George Nicholas said: "The proportion of taxes is fixed by the number of inhabitants, and not regulated by the extent of territory or fertility of soil. * * * Each state will know, from its population, its proportion of any general tax. As it was justly observed by the gentleman over the way [Mr. Randolph], they cannot possibly exceed that proportion. They are limited and restrained expressly to it. The state legislatures have no check of this kind. Their power is uncontrolled." 3 Elliot, Deb. 243, 244.

Mr. Madison remarked that "they will be limited to fix the proportion of each state, and they must raise it in the most convenient and satisfactory manner to the public." 3 Elliot, Deb. 255.

From these references—and they might be extended indefinitely—it is clear that the rule to govern each of the great classes into which taxes were divided was prescribed in view of the commonly accepted distinction between them and of the taxes directly levied under the systems of the states; and that the difference between direct and indirect taxation was fully appreciated is supported by the congressional debates after the government was organized.

In the debates in the house of representatives preceding the passage of the act of congress to lay "duties upon carriages for the conveyance of persons," approved June 5, 1794 (1 Stat. 373, c. 45), Mr. Sedgwick said that "a capitation tax, and taxes on land and on property and income generally, were direct charges, as well in the immediate as ultimate sources of contribution. He had considered those, and those only, as direct taxes in their operation and effects. On the other hand, a tax imposed on a specific article of personal property, and particularly of objects of luxury, as in the case under consideration, he had never supposed had been considered a direct tax, within the meaning of the constitution."

Mr. Dexter observed that his colleague "had stated the meaning of direct taxes to be a capitation tax, or a general tax on all the taxable property of the citizens; and that a gentleman from Virginia [Mr. Nicholas] thought the meaning was that all taxes are direct which are paid by the citizen without being recompensed by the consumer; but that, where the tax was only advanced and repaid by the consumer, the tax was indirect. He thought that both opinions were just, and not inconsistent, though the gentlemen had differed about them. He thought that a general tax on all taxable property was a direct tax, because it was paid without being recompensed by the consumer." Ann. 3d Cong. 644, 646.

At a subsequent day of the debate, Mr. Madison objected to the tax on carriages as "an unconstitutional tax"; but Fisher Ames declared that he had satisfied himself that it was not a direct tax, as "the duty falls not on the possession, but on the use." Ann. 730.

Mr. Madison wrote to Jefferson on May 11, 1794: "And the tax on carriages succeeded, in spite of the constitution, by a majority of twenty, the advocates for the principle being re-enforced by the adversaries to luxuries." "Some of the motives which they decoyed to their support ought to premonish them of the danger. By breaking down the barriers of the constitution, and giving sanction to the idea of sumptuary regulations, wealth may find a precarious defense in the shield of justice. If luxury, as such, is to be taxed, the greatest of all luxuries, says Paine, is a great

estate. Even on the present occasion, it has been found prudent to yield to a tax on transfers of stock in the funds and in the banks." 2 Mad. Writings, 14.

But Albert Gallatin, in his Sketch of the Finances of the United States, published in November, 1796, said: "The most generally received opinion, however, is that, by direct taxes in the constitution, those are meant which are raised on the capital or revenue of the people; by indirect, such as are raised on their expense. As that opinion is in itself rational, and conformable to the decision which has taken place on the subject of the carriage tax, and as it appears important, for the sake of preventing future controversies, which may be not more fatal to the revenue than to the tranquillity of the Union, that a fixed interpretation should be generally adopted, it will not be improper to corroborate it by quoting the author from whom the idea seems to have been borrowed." He then quotes from Smith's Wealth of Nations, and continues: "The remarkable coincidence of the clause of the constitution with this passage in using the word 'capitation' as a generic expression, including the different species of direct taxes,—an acceptation of the word peculiar, it is believed, to Dr. Smith,—leaves little doubt that the framers of the one had the other in view at the time, and that they, as well as he, by direct taxes, meant those paid directly from the falling immediately on the revenue; and by indirect, those which are paid indirectly out of the revenue by falling immediately upon the expense." 3 Gall. Writings (Adams' Ed.) 74, 75.

The act provided in its first section "that there shall be levied, collected, and paid upon all carriages for the conveyance of persons, which shall be kept by or for any person for his or her own use, or to be let out to hire or for the conveyance of passengers, the several duties and rates following"; and then followed a fixed yearly rate on every coach, chariot, phaeton, and coachee, every four-wheel and every two-wheel top carriage, and upon every other two-wheel carriage varying according to the vehicle.

In Hylton v. U. S. (decided in March, 1796) 3 Dall. 171, this court held the act to be constitutional, because not laying a direct tax. Chief Justice Ellsworth and Mr. Justice Cushing took no part in the decision, and Mr. Justice Wilson gave no reasons.

Mr. Justice Chase said that he was inclined to think (but of this he did not "give a judicial opinion") that "the direct taxes contemplated by the constitution are only two, to wit, a capitation or poll tax, simply, without regard to property, profession, or any other circumstance, and a tax on land"; and that he doubted "whether a tax, by a general assessment on personal property, within the United States, is included within the term 'direct tax.'" But he thought that "an annual tax on carriages for the conveyance of persons may be considered as within the power granted to congress to lay duties. The term 'duty' is the most comprehensive next to the generical term 'tax'; and practically, in Great Britain (whence we take our general ideas of taxes, duties, imposts, excises, customs, etc.), embraces taxes on stamps, tolls for passage, etc., and is not confined to taxes on importation only. It seems to me that a tax on expense is an indirect tax; and I think an annual tax on a carriage for the conveyance of persons is of that kind, because a carriage is a consumable commodity, and such annual tax on it is on the expense of the owner."

Mr. Justice Paterson said that "the constitution declares that a capitation tax is a direct tax; and, both in theory and practice, a tax on land is deemed to be a direct tax. * * * It is not necessary to determine whether a tax on the product of land be a direct or indirect tax. Perhaps, the immediate product of land, in its original and crude state, ought to be considered as the land itself; it makes part of it; or else the provision made against taxing exports would be easily eluded. Land, independently of its produce, is of no value. * * * Whether direct taxes, in the sense of the constitution, comprehend any other tax than a capitation tax, and taxes on land, is a questionable point. * * * But as it is not before the court, it would be improper to give any decisive opinion upon it." And he concluded: "All taxes on expenses or consumption are indirect taxes. A tax on carriages is of this kind, and, of course, is not a direct tax." This conclusion he fortified by reading extracts from Adam Smith on the taxation of consumable commodities.

Mr. Justice Iredell said: "There is no necessity or propriety in determining what is or is not a direct or indirect tax in all cases. Some difficulties may occur which we do not at present foresee. Perhaps a direct tax, in the sense of the constitution, can mean nothing but a tax on something inseparably annexed to the soil; something capable of apportionment under all such circumstances. A land or a poll tax may be considered of this description. * * * In regard to other articles, there may possibly be considerable doubt. It is sufficient, on the present occasion, for the court to be satisfied that this is not a direct tax contemplated by the constitution, in order to affirm the present judgment."

It will be perceived that each of the justices, while suggesting doubt whether anything but a capitation or a land tax was a direct tax within the meaning of the constitution, distinctly avoided expressing an opinion upon that question or laying down a comprehensive definition, but confined his opinion to the case before the court.

The general line of observation was obviously influenced by Mr. Hamilton's brief for the government, in which he said: "The following are presumed to be the only direct taxes: Capitation or poll taxes, taxes on

lands and buildings, general assessments, whether on the whole property of individuals, or on their whole real or personal estate. All else must, of necessity, be considered as indirect taxes." 7 Hamilton's Works (Lodge's Ed.) 332.

Mr. Hamilton also argued: "If the meaning of the word 'excise' is to be sought in a British statute, it will be found to include the duty on carriages, which is there considered as an 'excise.' * * * An argument results from this, though not perhaps a conclusive one, yet, where so important a distinction in the constitution is to be realized, it is fair to seek the meaning of terms in the statutory language of that country from which our jurisprudence is derived." 7 Hamilton's Works (Lodge's Ed.) 333.

If the question had related to an income tax, the reference would have been fatal, as such taxes have been always classed by the law of Great Britain as direct taxes.

The above act was to be enforced for two years, but before it expired was repealed, as was the similar act of May 28, 1796, c. 37, which expired August 31, 1801 (1 Stat. 478, 482).

By the act of July 14, 1798, when a war with France was supposed to be impending, a direct tax of two millions of dollars was apportioned to the states respectively, in the manner prescribed, which tax was to be collected by officers of the United States, and assessed upon "dwelling houses, lands, and slaves," according to the valuations and enumerations to be made pursuant to the act of July 9, 1798, entitled "An act to provide for the valuation of lands and dwelling houses and the enumeration of slaves within the United States." 1 Stat. 597, c. 75; Id. 580, c. 70. Under these acts, every dwelling house was assessed according to a prescribed value, and the sum of 50 cents upon every slave enumerated, and the residue of the sum apportioned was directed to be assessed upon the lands within each state according to the valuation made pursuant to the prior act, and at such rate per centum as would be sufficient to produce said remainder. By the act of August 2, 1813, a direct tax of three millions of dollars was laid and apportioned to the states respectively, and reference had to the prior act of July 22, 1813, which provided that, whenever a direct tax should be laid by the authority of the United States, the same should be assessed and laid "on the value of all lands, lots of ground with their improvements, dwelling houses, and slaves, which several articles subject to taxation shall be enumerated and valued by the respective assessors at the rate each of them is worth in money." 3 Stat. 53, c. 37; Id. 22, c. 16. The act of January 9, 1815, laid a direct tax of six millions of dollars, which was apportioned, assessed, and laid as in the prior act on all lands, lots of grounds with their improvements, dwelling houses, and slaves. These acts are attributable to the war of 1812.

The act of August 6, 1861 (12 Stat. 294, c. 45), imposed a tax of twenty millions of dollars, which was apportioned and to be levied wholly on real estate, and also levied taxes on incomes, whether derived from property or profession, trade or vocation (12 Stat. 309). And this was followed by the acts of July 1, 1862 (12 Stat. 473, c. 119); March 3, 1863 (12 Stat. 718, 723, c. 74); June 30, 1864 (13 Stat. 281, c. 173); March 3, 1865 (13 Stat. 479, c. 78); March 10, 1866 (14 Stat. 4, c. 15); July 13, 1866 (14 Stat. 137, c. 184); March 2, 1867 (14 Stat. 477, c. 169); and July 14, 1870 (16 Stat. 256, c. 255). The differences between the latter acts and that of August 15, 1894, call for no remark in this connection. These acts grew out of the war of the Rebellion, and were, to use the language of Mr. Justice Miller, "part of the system of taxing incomes, earnings, and profits adopted during the late war, and abandoned as soon after that war was ended as it could be done safely." Railroad Co. v. Collector, 100 U. S. 595, 598.

From the foregoing it is apparent (1) that the distinction between direct and indirect taxation was well understood by the framers of the constitution and those who adopted it; (2) that, under the state systems of taxation, all taxes on real estate or personal property or the rents or income thereof were regarded as direct taxes; (3) that the rules of apportionment and of uniformity were adopted in view of that distinction and those systems; (4) that whether the tax on carriages was direct or indirect was disputed, but the tax was sustained as a tax on the use and an excise; (5) that the original expectation was that the power of direct taxation would be exercised only in extraordinary exigencies; and down to August 15, 1894, this expectation has been realized. The act of that date was passed in a time of profound peace, and if we assume that no special exigency called for unusual legislation, and that resort to this mode of taxation is to become an ordinary and usual means of supply, that fact furnishes an additional reason for circumspection and care in disposing of the case.

We proceed, then, to examine certain decisions of this court under the acts of 1861 and following years, in which it is claimed that this court has heretofore adjudicated that taxes like those under consideration are not direct taxes, and subject to the rule of apportionment, and that we are bound to accept the rulings thus asserted to have been made as conclusive in the premises. Is this contention well founded as respects the question now under examination? Doubtless the doctrine of stare decisis is a salutary one, and to be adhered to on all proper occasions, but it only arises in respect of decisions directly upon the points in issue.

The language of Chief Justice Marshall in Cohens v. Virginia, 6 Wheat. 264, 399, may profitably again be quoted: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in con-

nection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

So in Carroll v. Carroll's Lessee, 16 How. 275, 286, where a statute of the state of Maryland came under review, Mr. Justice Curtis said: "If the construction put by the court of a state upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties, and decide to whom the property in contestation belongs. And therefore this court, and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties."

Nor is the language of Mr. Chief Justice Taney inapposite, as expressed in The Genesee Chief, 12 How. 443, wherein it was held that the lakes, and navigable waters connecting them, are within the scope of admiralty and maritime jurisdiction as known and understood in the United States when the constitution was adopted, and the preceding case of The Thomas Jefferson, 10 Wheat. 428, was overruled. The chief justice said: "It was under the influence of these precedents and this usage that the case of The Thomas Jefferson, 10 Wheat. 428, was decided in this court, and the jurisdiction of the courts of admiralty of the United States declared to be limited to the ebb and flow of the tide. The Orleans v. Phoebus, 11 Pet. 175, afterwards followed this case, merely as a point decided. It is the decision in the case of The Thomas Jefferson which mainly embarrasses the court in the present inquiry. We are sensible of the great weight to which it is entitled. But at the same time we are convinced that if we follow it we follow an erroneous decision into which the court fell, when the great importance of the question as it now presents itself could not be foreseen, and the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided. For the decision was made in 1825, when the commerce on the rivers of the West and on the Lakes was in its infancy, and of little importance, and but little regarded, compared with that of the present day. Moreover, the nature of the questions concerning the extent of the admiralty jurisdiction, which have arisen in this court, were not calculated to call its attention particularly to the one we are now considering."

Manifestly, as this court is clothed with the power and intrusted with the duty to maintain the fundamental law of the constitution, the discharge of that duty requires it not to extend any decision upon a constitutional question if it is convinced that error in principle might supervene.

Let us examine the cases referred to in the light of these observations.

In Insurance Co. v. Soule, 7 Wall. 433, the validity of a tax which was described as "upon the business of an insurance company," was sustained on the ground that it was "a duty or excise," and came within the decision in Hylton's Case. The arguments for the insurance company were elaborate, and took a wide range, but the decision rested on narrow ground, and turned on the distinction between an excise duty and a tax strictly so termed, regarding the former a charge for a privilege, or on the transaction of business, without any necessary reference to the amount of property belonging to those on whom the charge might fall, although it might be increased or diminished by the extent to which the privilege was exercised or the business done. This was in accordance with Society v. Coite, 6 Wall. 594, Provident Inst. v. Massachusetts, Id. 611, and Hamilton Co. v. Massachusetts, Id. 632, in which cases there was a difference of opinion on the question whether the tax under consideration was a tax on the property, and not upon the franchise or privilege. And see Van Allen v. Assessors, 3 Wall. 573; Home Ins. Co. v. New York, 134 U. S. 594, 10 Sup. Ct. 593; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876.

In Bank v. Fenno, 8 Wall. 533, a tax was laid on the circulation of state banks or national banks paying out the notes of individuals or state banks, and it was held that it might well be classed under the head of duties, and as falling within the same category as Soule's Case, 7 Wall. 433. It was declared to be of the same nature as excise taxation on freight receipts, bills of lading, and passenger tickets issued by a railroad company. Referring to the discussions in the convention which framed the constitution, Mr. Chief Justice Chase observed that what was said there "doubtless shows uncertainty as to the true meaning of the term 'direct tax,' but it indicates also an understanding that direct taxes were such as may be levied by capitation and on lands and appurtenances, or perhaps by valuation and assessment of personal property upon general lists; for these were the subjects from which the states at that time usually raised their principal supplies."

And in respect of the opinions in Hylton's Case the chief justice said: "It may further be taken as established upon the testimony of Paterson that the words 'direct taxes,' as used in the constitution, comprehended only capitation taxes and taxes on land, and perhaps taxes on personal property by general valuation and assessment of the various descriptions possessed within the several states."

In National Bank v. U. S., 101 U. S. 1, involving the constitutionality of section 3413 of the Revised Statutes, enacting that "every national banking association, state bank or banker, or association, shall pay a tax of ten per centum on the amount of notes of any town, city, or municipal corporation, paid out by them," Bank v. Fenno was cited with approval to the point that congress, having undertaken to provide a currency for the whole country, might, to secure the benefit of it to the people, restrain, by suitable enactments, the circulation as money of any notes not issued under its authority; and Mr. Chief Justice Waite, speaking for the court, said, "The tax thus laid is not on the obligation, but on its use in a particular way."

Scholey v. Rew, 23 Wall. 331, was the case of a succession tax, which the court held to be "plainly an excise tax or duty" "upon the devolution of the estate, or the right to become beneficially entitled to the same or the income thereof in possession or expectancy." It was like the succession tax of a state, held constitutional in Mager v. Grima, 8 How. 490; and the distinction between the power of a state and the power of the United States to regulate the succession of property was not referred to, and does not appear to have been in the mind of the court. The opinion stated that the act of parliament from which the particular provision under consideration was borrowed had received substantially the same construction, and cases under that act hold that a succession duty is not a tax upon income or upon property, but on the actual benefit derived by the individual, determined as prescribed. In re Elwes, 3 Hurl. & N. 719; Attorney General v. Earl of Sefton, 2 Hurl. & C. 362, 3 Hurl. & C. 1023, and 11 H. L. Cas. 257.

In Railroad Co. v. Collector, 100 U. S. 595, the validity of a tax collected of a corporation upon the interest paid by it upon its bonds was held to be "essentially an excise on the business of the class of corporations mentioned in the statute." And Mr. Justice Miller, in delivering the opinion, said: "As the sum involved in this suit is small, and the law under which the tax in question was collected has long since been repealed, the case is of little consequence as regards any principle involved in it as a rule of future action."

All these cases are distinguishable from that in hand, and this brings us to consider that of Springer v. U. S., 102 U. S. 586, chiefly relied on and urged upon us as decisive.

That was an action of ejectment, brought on a tax deed issued to the United States on sale of defendant's real estate for income taxes. The defendant contended that the deed was void, because the tax was a direct tax, not levied in accordance with the constitution. Unless the tax were wholly invalid, the defense failed.

The statement of the case in the report shows that Springer returned a certain amount as his net income for the particular year, but does not give the details of what his income, gains, and profits consisted in.

The original record discloses that the income was not derived in any degree from real estate, but was in part professional as attorney at law, and the rest interest on United States bonds. It would seem probable that the court did not feel called upon to advert to the distinction between the latter and the former source of income, as the validity of the tax as to either would sustain the action.

The opinion thus concludes: "Our conclusions are that direct taxes, within the meaning of the constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty."

While this language is broad enough to cover the interest as well as the professional earnings, the case would have been more significant as a precedent if the distinction had been brought out in the report and commented on in arriving at judgment, for a tax on professional receipts might be treated as an excise or duty, and therefore indirect, when a tax on the income of personalty might be held to be direct.

Be this as it may, it is conceded in all these cases, from that of Hylton to that of Springer, that taxes on land are direct taxes, and in none of them is it determined that taxes on rents or income derived from land are not taxes on land.

We admit that it may not unreasonably be said that logically, if taxes on the rents, issues, and profits of real estate are equivalent to taxes on real estate, and are therefore direct taxes, taxes on the income of personal property as such are equivalent to taxes on such property, and therefore direct taxes. But we are considering the rule stare decisis, and we must decline to hold ourselves bound to extend the scope of decisions,—none of which discussed the question whether a tax on the income from personalty is equivalent to a tax on that personalty, but all of which held real estate liable to direct taxation only,—so as to sustain a tax on the income of realty on the ground of being an excise or duty.

As no capitation or other direct tax was to be laid otherwise than in proportion to the population, some other direct tax than a capitation tax (and, it might well enough be argued, some other tax of the same kind as a capita-

tion tax) must be referred to, and it has always been considered that a tax upon real estate eo nomine, or upon its owners in respect thereof, is a direct tax, within the meaning of the constitution. But is there any distinction between the real estate itself or its owners in respect of it and the rents or income of the real estate coming to the owners as the natural and ordinary incident of their ownership?

If the constitution had provided that congress should not levy any tax upon the real estate of any citizen of any state, could it be contended that congress could put an annual tax for five or any other number of years upon the rent or income of the real estate? And if, as the constitution now reads, no unapportioned tax can be imposed upon real estate, can congress without apportionment nevertheless impose taxes upon such real estate under the guise of an annual tax upon its rents or income?

As, according to the feudal law, the whole beneficial interest in the land consisted in the right to take the rents and profits, the general rule has always been, in the language of Coke, that "if a man seised of land in fee by his deed granteth to another the profits of those lands, to have and to hold to him and his heirs, and maketh livery secundum formam chartae, the whole land itself doth pass. For what is the land but the profits thereof?" Co. Litt. 45. And that a devise of the rents and profits or of the income of lands passes the land itself both at law and in equity. 1 Jarm. Wills (5th Ed.) *798, and cases cited.

The requirement of the constitution is that no direct tax shall be laid otherwise than by apportionment. The prohibition is not against direct taxes on land, from which the implication is sought to be drawn that indirect taxes on land would be constitutional, but it is against all direct taxes; and it is admitted that a tax on real estate is a direct tax. Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate eo nomine. The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income. This law taxes the income received from land and the growth or produce of the land. Mr. Justice Paterson observed in Hylton's Case, "land, independently of its produce, is of no value," and certainly had no thought that direct taxes were confined to unproductive land.

If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot be thus evaded. It is the substance, and not the form, which controls, as has indeed been established by repeated decisions of this court. Thus in Brown v. Maryland, 12 Wheat. 419, 444, it was held that the tax on the occupation of an importer was the same as a tax on imports, and therefore void. And Chief Justice Marshall said: "It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself."

In Weston v. City Council, 2 Pet. 449, it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible. The ordinance of the city of Charleston involved in that case was exceedingly obscure; but the opinions of Mr. Justice Thompson and Mr. Justice Johnson, who dissented, make it clear that the levy was upon the interest of the bonds and not upon the bonds, and they held that it was an income tax, and as such sustainable; but the majority of the court, Chief Justice Marshall delivering the opinion, overruled that contention.

So in Dobbins v. Commissioners, 16 Pet. 435, it was decided that the income from an official position could not be taxed if the office itself was exempt.

In Almy v. California, 24 How. 169, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented; in Railroad Co. v. Jackson, 7 Wall. 262, that a tax upon the interest payable on bonds was a tax not upon the debtor, but upon the security; and in Cook v. Pennsylvania, 97 U. S. 566, that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold.

In Philadelphia & S. S. S. Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118, and Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1380, it was held that a tax on income received from interstate commerce was a tax upon the commerce itself, and therefore unauthorized. And so, although it is thoroughly settled that where by way of duties laid on the transportation of the subjects of interstate commerce, and on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce, and cannot be sustained, yet the

property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or domestic commerce, may be taxed; and when the tax is substantially a mere tax on property, and not one imposed on the privilege of doing interstate commerce, the exaction may be sustained. "The substance, and not the shadow, determines the validity of the exercise of the power." Telegraph Co. v. Adams, 155 U. S. 688, 15 Sup. Ct. 268.

Nothing can be clearer than that what the constitution intended to guard against was the exercise by the general government of the power of directly taxing persons and property within any state through a majority made up from the other states. It is true that the effect of requiring direct taxes to be apportioned among the states in proportion to their population is necessarily that the amount of taxes on the individual taxpayer in a state having the taxable subject-matter to a larger extent in proportion to its population than another state has, would be less than in such other state; but this inequality must be held to have been contemplated, and was manifestly designed to operate to restrain the exercise of the power of direct taxation to extraordinary emergencies, and to prevent an attack upon accumulated property by mere force of numbers.

It is not doubted that property owners ought to contribute in just measure to the expenses of the government. As to the states and their municipalities, this is reached largely through the imposition of direct taxes. As to the federal government, it is attained in part through excises and indirect taxes upon luxuries and consumption generally, to which direct taxation may be added to the extent the rule of apportionment allows. And through one mode or the other the entire wealth of the country, real and personal, may be made, as it should be, to contribute to the common defense and general welfare.

But the acceptance of the rule of apportionment was one of the compromises which made the adoption of the constitution possible, and secured the creation of that dual form of government, so elastic and so strong, which has thus far survived in unabated vigor. If, by calling a tax indirect when it is essentially direct, the rule of protection could be frittered away, one of the great landmarks defining the boundary between the nation and the states of which it is composed, would have disappeared, and with it one of the bulwarks of private rights and private property.

We are of opinion that the law in question, so far as it levies a tax on the rents or income of real estate, is in violation of the constitution, and is invalid.

Another question is directly presented by the record as to the validity of the tax levied by the act upon the income derived from municipal bonds. The averment in the bill is that the defendant company owns two millions of the municipal bonds of the city of New York, from which it derives an annual income of $60,000, and that the directors of the company intend to return and pay the taxes on the income so derived.

The constitution contemplates the independent exercise by the nation and the state, severally, of their constitutional powers.

As the states cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the constitution to tax either the instrumentalities or the property of a state.

A municipal corporation is the representative of the state, and one of the instrumentalities of the state government. It was long ago determined that the property and revenues of municipal corporations are not subjects of federal taxation. Collector v. Day, 11 Wall. 115; U. S. v. Railroad Co., 17 Wall. 322, 332. In Collector v. Day it was adjudged that congress had no power, even by an act taxing all incomes, to levy a tax upon the salaries of judicial officers of a state, for reasons similar to those on which it had been held in Dobbins v. Commissioners, 16 Pet. 435, that a state could not tax the salaries of officers of the United States. Mr. Justice Nelson, in delivering judgment, said: "The general government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme; but the states, within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the states."

This is quoted in Van Brocklin v. Tennessee, 117 U. S. 151, 178, 6 Sup. Ct. 670, and the opinion continues: "Applying the same principles, this court in U. S. v. Baltimore & O. R. Co., 17 Wall. 322, held that a municipal corporation within a state could not be taxed by the United States on the dividends or interest of stock or bonds held by it in a railroad or canal company, because the municipal corporation was a representative of the state, created by the state to exercise a limited portion of its powers of government, and therefore its revenues, like those of the state itself, were not taxable by the United States. The revenues thus adjudged to be exempt from federal taxation were not themselves appropriated to any specific public use, nor derived from property held by the state or by the municipal corporation for any specific public use, but were part of the general income of that corporation, held for the public use in no other sense than all property and income belonging to it in its municipal character must be so held. The reasons for exempting all the property and income of a state, or of a municipal corporation, which is

a political division of the state, from federal taxation, equally require the exemption of all the property and income of the national government from state taxation."

In Mercantile Bank v. City of New York, 121 U. S. 138, 162, 7 Sup. Ct. 826, this court said: "Bonds issued by the state of New York, or under its authority, by its public municipal bodies, are means for carrying on the work of the government, and are not taxable, even by the United States, and it is not a part of the policy of the government which issues them to subject them to taxation for its own purposes."

The question in Bonaparte v. Tax Court, 104 U. S. 592, was whether the registered public debt of one state, exempt from taxation by that state, or actually taxed there, was taxable by another state, when owned by a citizen of the latter, and it was held that there was no provision of the constitution of the United States which prohibited such taxation. The states had not covenanted that this could not be done, whereas, under the fundamental law, as to the power to borrow money, neither the United States, on the one hand, nor the states on the other, can interfere with that power as possessed by each, and an essential element of the sovereignty of each.

The law under consideration provides "that nothing herein contained shall apply to states, counties or municipalities." It is contended that, although the property or revenues of the states or their instrumentalities cannot be taxed, nevertheless the income derived from state, county, and municipal securities can be taxed. But we think the same want of power to tax the property or revenues of the states or their instrumentalities exists in relation to a tax on the income from their securities, and for the same reason; and that reason is given by Chief Justice Marshall, in Weston v. City Council, 2 Pet. 449, 468, where he said: "The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operations of government. It may be carried to an extent which shall arrest them entirely. * * * The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the constitution." Applying this language to these municipal securities, it is obvious that taxation on the interest therefrom would operate on the power to borrow before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the states and their instrumentalities to borrow money, and consequently repugnant to the constitution.

Upon each of the other questions argued at the bar, to wit: (1) Whether the void provisions as to rents and income from real estate invalidated the whole act; (2) whether, as to the income from personal property, as such, the act is unconstitutional, as laying direct taxes; (3) whether any part of the tax, if not considered as a direct tax, is invalid for want of uniformity on either of the grounds suggested,—the justices who heard the argument are equally divided, and therefore no opinion is expressed.

The result is that the decree of the circuit court is reversed and the cause remanded, with directions to enter a decree in favor of the complainant in respect only of the voluntary payment of the tax on the rents and income of the real estate of the defendant company, and of that which it holds in trust, and on the income from the municipal bonds owned or so held by it.

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Mr. Justice WHITE (dissenting). My brief judicial experience has convinced me that the custom of filing long dissenting opinions is one "more honored in the breach than in the observance." The only purpose which an elaborate dissent can accomplish, if any, is to weaken the effect of the opinion of the majority, and thus engender want of confidence in the conclusions of courts of last resort. This consideration would impel me to content myself with simply recording my dissent in the present case, were it not for the fact that I consider that the result of the opinion of the court just announced is to overthrow a long and consistent line of decisions, and to deny to the legislative department of the government the possession of a power conceded to it by universal consensus for 100 years, and which has been recognized by repeated adjudications of this court. The issues presented are as follows:

Complainant, as a stockholder in a corporation, avers that the latter will voluntarily pay the income tax, levied under the recent act of congress; that such tax is unconstitutional; and that its voluntary payment will seriously affect his interest by defeating his right to test the validity of the exaction, and also lead to a multiplicity of suits against the corporation. The prayer of the bill is as follows: First, that it may be decreed that the provisions known as "The Income Tax Law," incorporated in the act of congress passed August 15, 1894, are unconstitutional, null, and void; second, that the defendant be restrained from voluntarily complying with the provisions of that act by making its returns and statements, and paying the tax. The bill, therefore, presents two substantial questions for decision: The right of the plaintiff to relief in the form in which he claims it, and his right to relief on the merits.

The decisions of this court hold that the collection of a tax levied by the government of the United States will not be restrained by its courts. Cheatham v. U. S., 92 U. S. 85; Snyder v. Marks, 109 U. S. 189, 3 Sup. Ct. 157. See, also, Elliott v. Swartwout, 10

Pet. 137; City of Philadelphia v. Collector, 5 Wall. 720; Hornthal v. Collector, 9 Wall. 560. The same authorities have established the rule that the proper course, in a case of illegal taxation, is to pay the tax under protest or with notice of suit, and then bring an action against the officer who collected it. The statute law of the United States, in express terms, gives a party who has paid a tax under protest the right to sue for its recovery. Rev. St. § 3226.

The act of 1867 forbids the maintenance of any suit "for the purpose of restraining the assessment or collection of any tax." The provisions of this act are now found in Rev. St. § 3224.

The complainant is seeking to do the very thing which, according to the statute and the decisions above referred to, may not be done. If the corporator cannot have the collection of the tax enjoined, it seems obvious that he cannot have the corporation enjoined from paying it, and thus do by indirection what he cannot do directly.

It is said that such relief as is here sought has been frequently allowed. The cases relied on are Dodge v. Woolsey, 18 How. 331, and Hawes v. Oakland, 104 U. S. 450. Neither of these authorities, I submit, is in point. In Dodge v. Woolsey, the main question at issue was the validity of a state tax, and that case did not involve the act of congress to which I have referred. Hawes v. Oakland was a controversy between a stockholder and a corporation, and had no reference whatever to taxation.

The complainant's attempt to establish a right to relief upon the ground that this is not a suit to enjoin the tax, but one to enjoin the corporation from paying it, involves the fallacy already pointed out,—that is, that a party can exercise a right indirectly which he cannot assert directly,—that he can compel his agent, through process of this court, to violate an act of congress.

The rule which forbids the granting of an injunction to restrain the collection of a tax is founded on broad reasons of public policy, and should not be ignored. In Cheatham v. U. S., supra, which involved the validity of an income tax levied under an act of congress prior to the one here in issue, this court, through Mr. Justice Miller, said:

"If there existed in the courts, state or national, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary. Dows v. City of Chicago, 11 Wall. 108. While a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, the general government has wisely made the payment of the tax claimed, whether of customs or of internal revenue, a condition precedent to a resort to the courts by the party against whom the tax is assessed. In the internal revenue branch it has further prescribed that no such suit shall be brought until the remedy by appeal has been tried; and, if brought after this, it must be within six months after the decision on the appeal. We regard this as a condition on which alone the government consents to litigate the lawfulness of the original tax. It is not a hard condition. Few governments have conceded such a right on any condition. If the compliance with this condition requires the party aggrieved to pay the money, he must do it."

Again, in State Railroad Tax Cases, 92 U. S. 575, the court said:

"That there might be no misunderstanding of the universality of this principle, it was expressly enacted, in 1867, that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' Rev. St. § 3224. And, though this was intended to apply alone to taxes levied by the United States, it shows the sense of congress of the evils to be feared if courts of justice could, in any case, interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and, to do this successfully, other instrumentalities and other modes of procedure are necessary than those which belong to courts of justice. See Cheatham v. Norvell, decided at this term; Nichols v. U. S., 7 Wall. 122; Dows v. City of Chicago, 11 Wall. 108."

The contention that a right to equitable relief arises from the fact that the corporator is without remedy, unless such relief be granted him, is, I think, without foundation. This court has repeatedly said that the illegality of a tax is not ground for the issuance of an injunction against its collection, if there be an adequate remedy at law open to the payer (Dows v. City of Chicago, 11 Wall. 108; Hannewinkle v. Georgetown, 15 Wall. 547; Board v. McComb, 92 U. S. 531; State Railroad Tax Cases, 92 U. S. 575; Union Pacific Ry. Co. v. Cheyenne, 113 U. S. 516, 5 Sup. Ct. 601; Milwaukee v. Koeffler, 116 U. S. 219, 6 Sup. Ct. 372; Express Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. 250), as in the case where the state statute, by which the tax is imposed, allows a suit for its recovery after payment under protest (Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646; Allen v. Car Co., 139 U. S. 658, 11 Sup. Ct. 682).

The decision here is that this court will allow, on the theory of equitable right, a remedy expressly forbidden by the statutes of the United States, though it has denied the existence of such a remedy in the case of a tax levied by a state.

Will it be said that, although a stockholder cannot have a corporation enjoined from paying a state tax where the state statute

gives him the right to sue for its recovery, yet when the United States not only gives him such right, but, in addition, forbids the issue of an injunction to prevent the payment of federal taxes, the court will allow to the stockholder a remedy against the United States tax which it refuses against the state tax?

The assertion that this is only a suit to prevent the voluntary payment of the tax suggests that the court may, by an order operating directly upon the defendant corporation, accomplish a result which the statute manifestly intended should not be accomplished by suit in any court. A final judgment forbidding the corporation from paying the tax will have the effect to prevent its collection, for it could not be that the court would permit a tax to be collected from a corporation which it had enjoined from paying. I take it to be beyond dispute that the collection of the tax in question cannot be restrained by any proceeding or suit, whatever its form, directly against the officer charged with the duty of collecting such tax. Can the statute be evaded, in a suit between a corporation and a stockholder, by a judgment forbidding the former from paying the tax, the collection of which cannot be restrained by suit in any court? Suppose, notwithstanding the final judgment just rendered, the collector proceeds to collect from the defendant corporation the taxes which the court declares, in this suit, cannot be legally assessed upon it. If that final judgment is sufficient in law to justify resistance against such collection, then we have a case in which a suit has been maintained to restrain the collection of taxes. If such judgment does not conclude the collector, who was not a party to the suit in which it was rendered, then it is of no value to the plaintiff. In other words, no form of expression can conceal the fact that the real object of this suit is to prevent the collection of taxes imposed by congress, notwithstanding the express statutory requirement that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Either the decision of the constitutional question is necessary or it is not. If it is necessary, then the court, by way of granting equitable relief, does the very thing which the act of congress forbids. If it is unnecessary, then the court decides the act of congress here asserted unconstitutional, without being obliged to do so by the requirements of the case before it.

This brings me to the consideration of the merits of the cause.

The constitutional provisions respecting federal taxation are four in number, and are as follows:

"(1) Representatives and direct taxes shall be apportioned among the several states, which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years and excluding Indians not taxed, three-fifths of all other persons." Article 1, § 2, cl. 3. The fourteenth amendment modified this provision, so that the whole number of persons in each state should be counted, "Indians not taxed" excluded.

"(2) The congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States." Article 1, § 8, cl. 1.

"(3) No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken." Article 1, § 9, cl. 4.

"(4) No tax or duty shall be laid on articles exported from any state." Article 1, § 9, cl. 5.

It has been suggested that, as the above provisions ordain the apportionment of direct taxes, and authorize congress to "lay and collect taxes, duties, imposts, and excises," therefore there is a class of taxes which are neither direct, and are not duties, imposts, and excises, and are exempt from the rule of apportionment on the one hand, or of uniformity on the other. The soundness of this suggestion need not be discussed, as the words, "duties, imposts, and excises," in conjunction with the reference to direct taxes, adequately convey all power of taxation to the federal government.

It is not necessary to pursue this branch of the argument, since it is unquestioned that the provisions of the constitution vest in the United States plenary powers of taxation; that is, all the powers which belong to a government as such, except that of taxing exports. The court in this case so says, and quotes approvingly the language of this court, speaking through Mr. Chief Justice Chase, in License Tax Cases, 5 Wall. 462, as follows:

"It is true that the power of congress to tax is a very extensive power. It is given in the constitution with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject and may be exercised at discretion."

In deciding, then, the question of whether the income tax violates the constitution, we have to determine, not the existence of a power in congress, but whether an admittedly unlimited power to tax (the income tax not being a tax on exports) has been used according to the restrictions, as to methods for its exercise, found in the constitution. Not power, it must be borne in mind, but the manner of its use, is the only issue presented in this case. The limitations in regard to the mode of direct taxation imposed by the constitution are that capitation and other direct taxes shall be apportioned among the states

according to their respective numbers, while duties, imposts, and excises must be uniform throughout the United States. The meaning of the word "uniform" in the constitution need not be examined, as the court is divided upon that subject, and no expression of opinion thereon is conveyed or intended to be conveyed in this dissent.

In considering whether we are to regard an income tax as "direct" or otherwise, it will, in my opinion, serve no useful purpose, at this late period of our political history, to seek to ascertain the meaning of the word "direct" in the constitution by resorting to the theoretical opinions on taxation found in the writings of some economists prior to the adoption of the constitution or since. These economists teach that the question of whether a tax is direct or indirect depends not upon whether it is directly levied upon a person, but upon whether, when so levied, it may be ultimately shifted from the person in question to the consumer, thus becoming, while direct in the method of its application, indirect in its final results, because it reaches the person who really pays it only indirectly. I say it will serve no useful purpose to examine these writers, because, whatever may have been the value of their opinions as to the economic sense of the word "direct," they cannot now afford any criterion for determining its meaning in the constitution, inasmuch as an authoritative and conclusive construction has been given to that term, as there used, by an interpretation adopted shortly after the formation of the constitution by the legislative department of the government, and approved by the executive; by the adoption of that interpretation from that time to the present without question, and its exemplification and enforcement in many legislative enactments, and its acceptance by the authoritative text writers on the constitution; by the sanction of that interpretation, in a decision of this court rendered shortly after the constitution was adopted; and finally by the repeated reiteration and affirmance of that interpretation, so that it has become imbedded in our jurisprudence, and therefore may be considered almost a part of the written constitution itself.

Instead, therefore, of following counsel in their references to economic writers and their discussion of the motives and thoughts which may or may not have been present in the minds of some of the framers of the constitution, as if the question before us were one of first impression, I shall confine myself to a demonstration of the truth of the propositions just laid down.

In 1794 (1 Stat. 373, c. 45) congress levied, without reference to apportionment, a tax on carriages "for the conveyance of persons." The act provided "that there shall be levied, collected, and paid upon all carriages for the conveyance of persons which shall be kept by, or for any person for his or her own use, or to be let out to hire, or for the conveying of passengers, the several duties and rates following"; and then came a yearly tax on every "coach, chariot, phaeton, and coachee, every four-wheeled and every two-wheeled top carriage, and upon every other two-wheeled carriage," varying in amount according to the vehicle.

The debates which took place at the passage of that act are meagerly preserved. It may, however, be inferred from them that some considered that whether a tax was "direct" or not in the sense of the constitution depended upon whether it was levied on the object or on its use. The carriage tax was defended by a few on the ground that it was a tax on consumption. Mr. Madison opposed it as unconstitutional, evidently upon the conception that the word "direct" in the constitution was to be considered as having the same meaning as that which had been attached to it by some economic writers. His view was not sustained, and the act passed by a large majority,—49 to 22. It received the approval of Washington. The congress which passed this law numbered among its members many who sat in the convention which framed the constitution. It is moreover safe to say that each member of that congress, even although he had not been in the convention, had, in some way, either directly or indirectly, been an influential actor in the events which led up to the birth of that instrument. It is impossible to make an analysis of this act which will not show that its provisions constitute a rejection of the economic construction of the word "direct," and this result equally follows, whether the tax be treated as laid on the carriage itself or on its use by the owner. If viewed in one light, then the imposition of the tax on the owner of the carriage, because of his ownership, necessarily constituted a direct tax under the rule as laid down by economists. So, also, the imposition of a burden of taxation on the owner for the use by him of his own carriage made the tax direct according to the same rule. The tax having been imposed without apportionment, it follows that those who voted for its enactment must have given to the word "direct," in the constitution, a different significance from that which is affixed to it by the economists referred to.

The validity of this carriage tax was considered by this court in Hylton v. U. S., 3 Dall. 171. Chief Justice Ellsworth and Mr. Justice Cushing took no part in the decision. Mr. Justice Wilson stated that he had, in the circuit court of Virginia, expressed his opinion in favor of the constitutionality of the tax. Mr. Justice Chase, Mr. Justice Paterson, and Mr. Justice Iredell each expressed the reasons for his conclusions. The tax, though laid, as I have said, on the carriage, was held not to be a direct tax under the constitution. Two of the judges who sat in that case (Mr. Justice Paterson and Mr. Justice Wilson) had been distinguished members of the constitutional con-

vention. Excerpts from the observations of the justices are given in the opinion of the court. Mr. Justice Paterson, in addition to the language there quoted, spoke as follows (the italics being mine):

"*I never entertained a doubt that the principal—I will not say the only—objects that the framers of the constitution contemplated as falling within the rule of apportionment were a capitation tax and a tax on land.* Local considerations and the particular circumstances and relative situation of the states naturally lead to this view of the subject. The provision was made in favor of the Southern states. They possessed a large number of slaves. They had extensive tracts of territory, thinly settled, and not very productive. A majority of the states had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. The Southern states, if no provision had been introduced in the constitution, would have been wholly at the mercy of the other states. Congress, in such case, might tax slaves at discretion or arbitrarily, and land in every part of the Union after the same rate or measure,—so much a head in the first instance, and so much an acre in the second. To guard them against imposition in these particulars was the reason of introducing the clause in the constitution which directs that representatives and direct taxes shall be apportioned among the states according to their respective numbers."

It is evident that Mr. Justice Chase coincided with these views of Mr. Justice Paterson, though he was perhaps not quite so firmly settled in his convictions, for he said:

"I am inclined to think—but of this I do not give a judicial opinion—that the direct taxes contemplated by the constitution are only two, to wit, a capitation or poll tax simply, without regard to property, profession, or any other circumstances, and the tax on land. I doubt whether a tax by a general assessment of personal property within the United States is included within the term 'direct tax.'"

Mr. Justice Iredell certainly entertained similar views, since he said:

"Some difficulties may occur which we do not at present foresee. Perhaps a direct tax in the sense of the constitution can mean nothing but a tax on something inseparably annexed to the soil; something capable of apportionment under all such circumstances. A land or a poll tax may be considered of this description. * * * In regard to other articles there may possibly be considerable doubt."

These opinions strongly indicate that the real convictions of the justices were that only capitation taxes and taxes on land were direct within the meaning of the constitution, but they doubted whether some other objects of a kindred nature might not be embraced in that word. Mr. Justice Paterson had no doubt whatever of the limitation, and Justice Iredell's doubt seems to refer only to things which were inseparably connected with the soil, and which might therefore be considered, in a certain sense, as real estate.

That case, however, established that a tax levied without apportionment on an object of personal property was not a "direct tax" within the meaning of the constitution. There can be no doubt that the enactment of this tax and its interpretation by the court, as well as the suggestion, in the opinions delivered, that nothing was a "direct tax," within the meaning of the constitution, but a capitation tax and a tax on land, was all directly in conflict with the views of those who claimed at the time that the word "direct" in the constitution was to be interpreted according to the views of economists. This is conclusively shown by Mr. Madison's language. He asserts not only that the act had been passed contrary to the constitution, but that the decision of the court was likewise in violation of that instrument. Ever since the announcement of the decision in that case, the legislative department of the government has accepted the opinions of the justices, as well as the decision itself, as conclusive in regard to the meaning of the word "direct"; and it has acted upon that assumption in many instances, and always with executive indorsement. All the acts passed levying direct taxes confined them practically to a direct levy on land. True, in some of these acts a tax on slaves was included, but this inclusion, as has been said by this court, was probably based upon the theory that these were in some respects taxable along with the land, and therefore their inclusion indicated no departure by congress from the meaning of the word "direct" necessarily resulting from the decision in the Hylton Case, and which, moreover, had been expressly elucidated and suggested as being practically limited to capitation taxes and taxes on real estate by the justices who expressed opinions in that case.

These acts imposing direct taxes having been confined in their operation exclusively to real estate and slaves, the subject-matters indicated as the proper objects of direct taxation in the Hylton Case are the strongest possible evidence that this suggestion was accepted as conclusive, and had become a settled rule of law. Some of these acts were passed at times of great public necessity, when revenue was urgently required. The fact that no other subjects were selected for the purposes of direct taxation, except those which the judges in the Hylton Case had suggested as appropriate therefor, seems to me to lead to a conclusion which is absolutely irresistible,—that the meaning thus affixed to the word "direct" at the very formation of the government was considered as having been as irrevocably determined as if it had been written in the constitution in express terms. As I have already observed, every authoritative writer who has discussed the constitution from that date down to this has treated this

judicial and legislative ascertainment of the meaning of the word "direct" in the constitution as giving it a constitutional significance, without reference to the theoretical distinction between "direct" and "indirect," made by some economists prior to the constitution or since. This doctrine has become a part of the hornbook of American constitutional interpretation, has been taught as elementary in all the law schools, and has never since then been anywhere authoritatively questioned. Of course, the text-books may conflict in some particulars, or indulge in reasoning not always consistent, but as to the effect of the decision in the Hylton Case and the meaning of the word "direct," in the constitution, resulting therefrom, they are a unit. I quote briefly from them.

Chancellor Kent, in his Commentaries, thus states the principle:

"The construction of the powers of congress relative to taxation was brought before the supreme court, in 1796, in the case of Hylton v. U. S. By the act of June 5, 1794, congress laid a duty upon carriages for the conveyance of persons, and the question was whether this was a 'direct tax,' within the meaning of the constitution. If it was not a direct tax, it was admitted to be rightly laid, under that part of the constitution which declares that all duties, imposts, and excises shall be uniform throughout the United States; but, if it was a direct tax, it was not constitutionally laid, for it must then be laid according to the census, under that part of the constitution which declares that direct taxes shall be apportioned among the several states according to numbers. The circuit court in Virginia was divided in opinion on the question, but on appeal to the supreme court it was decided that the tax on carriages was not a direct tax, within the letter or meaning of the constitution, and was therefore constitutionally laid.

"The question was deemed of very great importance, and was elaborately argued. It was held that a general power was given to congress to lay and collect taxes of every kind or nature, without any restraint. They had plenary power ever every species of taxable property, except exports. But there were two rules prescribed for their government,—the rule of uniformity, and the rule of apportionment. Three kinds of taxes, viz. duties, imposts, and excises, were to be laid by the first rule; and capitation and other direct taxes, by the second rule. If there were any other species of taxes, as the court seemed to suppose there might be, that were not direct, and not included within the words 'duties, imposts, or excises,' they were to be laid by the rule of uniformity or not, as congress should think proper and reasonable.

"The constitution contemplated no taxes as direct taxes but such as congress could lay in proportion to the census; and the rule of apportionment could not reasonably apply to a tax on carriages, nor could the tax on carriages be laid by that rule without very great inequality and injustice. If two states, equal in census, were each to pay 8,000 dollars by a tax on carriages, and in one state there were 100 carriages and in another 1,000, the tax on each carriage would be ten times as much in one state as in the other. While A. in the one state, would pay for his carriage eight dollars, B., in the other state, would pay for his carriage eighty dollars. In this way it was shown by the court that the notion that a tax on carriages was a 'direct tax,' within the purview of the constitution, and to be apportioned according to the census, would lead to the grossest abuse and oppression. This argument was conclusive against the construction set up, and the tax on carriages was considered as included within the power to lay duties; and the better opinion seemed to be that the direct taxes contemplated by the constitution were only two, viz. a capitation or poll tax and a tax on land." Kent, Comm. pp. 254–256.

Story, speaking on the same subject, says:

"Taxes on lands, houses, and other permanent real estate, or on parts or appurtenances thereof, have always been deemed of the same character; that is, direct taxes. It has been seriously doubted if, in the sense of the constitution, any taxes are direct taxes except those on polls or on lands. Mr. Justice Chase, in Hylton v. U. S., 3 Dall. 171, said: 'I am inclined to think that the direct taxes contemplated by the constitution are only two, viz., a capitation or poll tax simply, without regard to property, profession, or other circumstances, and a tax on land. I doubt whether a tax by a general assessment of personal property within the United States is included within the term "direct tax." ' Mr. Justice Paterson in the same case said: 'It is not necessary to determine whether a tax on the produce of land be a direct or an indirect tax. Perhaps the immediate product of land, in its original and crude state, ought to be considered as a part of the land itself. When the produce is converted into a manufacture it assumes a new shape, etc. Whether "direct taxes," in the sense of the constitution, comprehend any other tax than a capitation tax, or a tax on land, is a questionable point, etc. I never entertained a doubt that the principal—I will not say the only—objects that the framers of the constitution contemplated, as falling within the rule of apportionment, were a capitation tax and a tax on land.' And he proceeded to state that the rule of apportionment, both as regards representatives and as regards direct taxes, was adopted to guard the Southern states against undue impositions and oppressions in the taxing of slaves. Mr. Justice Iredell in the same case said: 'Perhaps a direct tax, in the sense of the constitution, can mean nothing but a tax on something inseparably annexed to the soil; something capable of apportionment under all such circumstances. A land or poll tax may be considered of this description. The latter is to be considered so,

particularly under the present constitution, on account of the slaves in the Southern states, who give a ratio in the representation in the proportion of three to five. Either of these is capable of an apportionment. In regard to other articles, there may possibly be considerable doubt.' The reasoning of the Federalists seems to lead to the same result." Story, Const. § 952.

Cooley, in his work on Constitutional Limitations (page 595), thus tersely states the rule:

"Direct taxes, when laid by congress, must be apportioned among the several states according to the representative population. The term 'direct taxes,' as employed in the constitution, has a technical meaning, and embraces capitation and land taxes only."

Miller on the Constitution (section 282a) thus puts it:

"Under the provisions already quoted, the question came up as to what is a 'direct tax,' and also upon what property it is to be levied, as distinguished from any other tax. In regard to this it is sufficient to say that it is believed that no other than a capitation tax of so much per head and a land tax is a 'direct tax,' within the meaning of the constitution of the United States. All other taxes, except imposts, are properly called 'excise taxes.' 'Direct taxes,' within the meaning of the constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate."

In Pomeroy's Constitutional Law (section 281) we read as follows:

"It becomes necessary, therefore, to inquire a little more particularly what are direct and what indirect taxes. Few cases on the general question of taxation have arisen and been decided by the supreme court, for the simple reason that, until the past few years, the United States has generally been able to obtain all needful revenue from the single source of duties upon imports. There can be no doubt, however, that all the taxes provided for in the internal revenue acts now in operation are indirect.

"This subject came before the supreme court of the United States in a very early case,—Hylton v. U. S. In the year 1794, congress laid a tax of ten dollars on all carriages, and the rate was thus made uniform. The validity of the statute was disputed. It was claimed that the tax was direct, and should have been apportioned among the states. The court decided that this tax was not direct. The reasons given for the decision are unanswerable, and would seem to cover all the provisions of the present internal revenue laws."

Hare, in his treatise on American Constitutional Law (pages 249, 250), is to the like effect:

"Agreeably to section 9 of article 1, paragraph 4, 'no capitation or other direct tax shall be laid except in proportion to the census or enumeration hereinbefore directed to be taken'; while section 3 of the same article requires that representation and direct taxes shall be apportioned among the several states * * * according to their respective numbers. 'Direct taxes,' in the sense of the constitution, are poll taxes and taxes on land."

Burroughs on Taxation (page 502) takes the same view:

"Direct Taxes. The kinds of taxation authorized are both direct and indirect. The construction given to the expression 'direct taxes' is that it includes only a tax on land and a poll tax, and this is in accord with the views of writers upon political economy."

Ordroneaux, in his Constitutional Legislation (page 225), says:

"Congress having been given the power 'to lay and collect taxes, duties, imposts, and excises,' the above three provisions are limitations upon the exercise of this authority:

"(1) By distinguishing between direct and indirect taxes as to their mode of assessment;

"(2) By establishing a permanent freedom of trade between the states; and

"(3) By prohibiting any discrimination in favor of particular states, through revenue laws establishing a preference between their ports and those of the others.

"These provisions should be read together, because they are at the foundation of our system of national taxation.

"The two rules prescribed for the government of congress in laying taxes are those of apportionment for direct taxes and uniformity for indirect. In the first class are to be found capitation or poll taxes and taxes on land; in the second, duties, imposts, and excises.

"The provision relating to capitation taxes was made in favor of the Southern states, and for the protection of slave property. While they possessed a large number of persons of this class, they also had extensive tracts of sparsely settled and unproductive lands. At the same time an opposite condition, both as to land territory and population, existed in a majority of the other states. Were congress permitted to tax slaves and land in all parts of the country at a uniform rate, the Southern slave states must have been placed at a great disadvantage. Hence, and to guard against this inequality of circumstances, there was introduced into the constitution the further provision that 'representatives and direct taxes shall be apportioned among the states according to their respective numbers.' This changed the basis of direct taxation from a strictly monetary standard, which could not, equitably, be made uniform throughout the country, to one resting upon population as the measure of representation. But for this congress might have taxed slaves arbitrarily, and at its pleasure, as so much property, and land uniformly throughout the Union, regardless of differences in productiveness. It is not strange, therefore, that in Hylton v. U. S. the court

said that: 'The rule of apportionment is radically wrong, and cannot be supported by any solid reasoning. It ought not, therefore, to be extended by construction. Apportionment is an operation on states, and involves valuations and assessments which are arbitrary, and should not be resorted to but in case of necessity.'

"Direct taxes being now well settled in their meaning, a tax on carriages kept for the use of the owner is not a capitation tax; nor a tax on the business of an insurance company; nor a tax on a bank's circulation; nor a tax on income; nor a succession tax. The foregoing are not, properly speaking, direct taxes within the meaning of the constitution, but excise taxes or duties."

Black, writing on Constitutional Law, says:

"But the chief difficulty has arisen in determining what is the difference between direct taxes and such as are indirect. In general usage, and according to the terminology of political economy, a direct tax is one which is levied upon the person who is to pay it, or upon his land or personalty, or his business or income, as the case may be. An indirect tax is one assessed upon the manufacturer or dealer in the particular commodity, and paid by him, but which really falls upon the consumer, since it is added to the market price of the commodity which he must pay. But the course of judicial decision has determined that the term 'direct,' as here applied to taxes, is to be taken in a more restricted sense. The supreme court has ruled that only land taxes and capitation taxes are 'direct,' and no others. In 1794 congress levied a tax of ten dollars on all carriages kept for use, and it was held that this was not a direct tax. And so also an income tax is not to be considered direct. Neither is a tax on the circulation of state banks, nor a succession tax, imposed upon every 'devolution of title to real estate.'" Op. cit. p. 162.

Not only have the other departments of the government accepted the significance attached to the word "direct" in the Hylton Case by their actions as to direct taxes, but they have also relied on it as conclusive in their dealings with indirect taxes by levying them solely upon objects which the judges in that case declared were not objects of direct taxation. Thus the affirmance by the federal legislature and executive of the doctrine established as a result of the Hylton Case has been twofold.

From 1861 to 1870 many laws levying taxes on income were enacted, as follows: Act Aug. 1861 (12 Stat. 309, 311); Act July, 1862 (12 Stat. 473, 475); Act March, 1863 (12 Stat. 718, 723); Act June, 1864 (13 Stat. 281, 285); Act March, 1865 (13 Stat. 479, 481); Act March, 1866 (14 Stat. 4, 5); Act July, 1866 (14 Stat. 137–140); Act March, 1867 (14 Stat. 477–480); Act July, 1870 (16 Stat. 256–261).

The statutes above referred to all cover income and every conceivable source of revenue from which it could result,—rentals from real estate, products of personal property, the profits of business or professions.

The validity of these laws has been tested before this court. The first case on the subject was that of Insurance Co. v. Soule, 7 Wall. 443. The controversy in that case arose under the ninth section of the act of July 13, 1866 (14 Stat. 137, 140), which imposed a tax on "all dividends in scrip and money, thereafter declared due, wherever and whenever the same shall be payable, to stockholders, policy holders, or depositors or parties whatsoever, including non-residents whether citizens or aliens, as part of the earnings, incomes or gains of any bank, trust company, savings institution, and of any fire, marine, life, or inland insurance company, either stock or mutual, under whatever name or style known or called in the United States or territories, whether specially incorporated or existing under general laws, and on all undistributed sum or sums made or added during the year to their surplus or contingent funds."

It will be seen that the tax imposed was levied on the income of insurance companies as a unit, including every possible source of revenue, whether from personal or real property, from business gains or otherwise. The case was presented here on a certificate of division of opinion below. One of the questions propounded was "whether the taxes paid by the plaintiff and sought to be recovered in this action are not direct taxes, within the meaning of the constitution of the United States." The issue, therefore, necessarily brought before this court was whether an act imposing an income tax on every possible source of revenue was valid or invalid. The case was carefully, ably, elaborately, and learnedly argued. The brief on behalf of the company, filed by Mr. Wills, was supported by another, signed by Mr. W. O. Bartlett, which covered every aspect of the contention. It rested the weight of its argument against the statute on the fact that it included the rents of real estate among the sources of income taxed, and therefore put a direct tax upon the land. Able as have been the arguments at bar in the present case, an examination of those then presented will disclose the fact that every view here urged was there pressed upon the court with the greatest ability, and after exhaustive research, equaled, but not surpassed, by the eloquence and learning which has accompanied the presentation of this case. Indeed, it may be said that the principal authorities cited and relied on now can be found in the arguments which were then submitted. It may be added that the case on behalf of the government was presented by Attorney General Evarts.

The court answered all the contentions by deciding the generic question of the validity of the tax, thus passing necessarily upon every issue raised, as the whole necessarily in-

cludes every one of its parts. I quote the reasoning applicable to the matter now in hand:

"The sixth question is: 'Whether the taxes paid by the plaintiff, and sought to be recovered back in this action, are not direct taxes, within the meaning of the constitution of the United States.' In considering this subject it is proper to advert to the several provisions of the constitution relating to taxation by congress. 'Representatives and direct taxes shall be apportioned among the several states which shall be included in this Union according to their respective numbers,' etc. 'Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.' 'No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.' 'No tax or duty shall be laid on articles exported from any state.'

"These clauses contain the entire grant of the taxing power by the organic law, with the limitations which that instrument imposes.

"The national government, though supreme within its own sphere, is one of limited jurisdiction and specific functions. It has no faculties but such as the constitution has given it, either expressly or incidentally by necessary intendment. Whenever any act done under its authority is challenged, the proper sanction must be found in its charter, or the act is ultra vires and void. This test must be applied in the examination of the question before us. If the tax to which it refers is a 'direct tax,' it is clear that it has not been laid in conformity to the requirements of the constitution. It is therefore necessary to ascertain to which of the categories named in the eighth section of the first article it belongs.

"What are direct taxes was elaborately argued and considered by this court in Hylton v. U. S., decided in the year 1796. One of the members of the court (Justice Wilson) had been a distinguished member of the convention which framed the constitution. It was unanimously held by the four justices who heard the argument that a tax upon carriages kept by the owner for his own use was not a direct tax. Justice Chase said: 'I am inclined to think—but of this I do not give a judicial opinion—that the direct taxes contemplated by the constitution are only two, to wit, a capitation or poll tax simply, without regard to property, profession, or any other circumstances, and a tax on land.' Paterson, J., followed in the same line of remarks. He said: 'I never entertained a doubt that the principal (I will not say the only) object the framers of the constitution contemplated as falling within the rule of apportionment was a capitation tax or a tax on land. * * * The constitution declares that a capitation tax is a direct tax, and both in theory and practice a tax on land is deemed to be a direct tax. In this way the terms "direct taxes" "capitation and other direct tax" are satisfied.'

"The views expressed in this case are adopted by Chancellor Kent and Justice Story in their examination of the subject. 'Duties' are defined by Tomlin to be things due and recoverable by law. The term, in its widest signification, is hardly less comprehensive than 'taxes.' It is applied, in its most restricted meaning, to customs; and in that sense is nearly the synonym of 'imposts.'

"'Impost' is a duty on imported goods and merchandise. In a larger sense, it is any tax or imposition. Cowell says it is distinguished from 'custom,' 'because custom is rather the profit which the prince makes on goods shipped out.' Mr. Madison considered the terms 'duties' and 'imposts' in these clauses as synonymous. Judge Tucker thought 'they were probably intended to comprehend every species of tax or contribution not included under the ordinary terms "taxes" and "excises."'

"'Excise' is defined to be an inland imposition, sometimes upon the consumption of the commodity, and sometimes upon the retail sale; sometimes upon the manufacturer, and sometimes upon the vendor.

"The taxing power is given in the most comprehensive terms. The only limitations imposed are that direct taxes, including the capitation tax, shall be apportioned; that duties, imposts, and excises shall be uniform; and that no duties shall be imposed upon articles exported from any state. With these exceptions, the exercise of the power is, in all respects, unfettered.

"If a tax upon carriages, kept for his own use by the owner, is not a direct tax, we can see no ground upon which a tax upon the business of an insurance company can be held to belong to that class of revenue charges.

"It has been held that congress may require direct taxes to be laid and collected in the territories as well as in the states.

"The consequences which would follow the apportionment of the tax in question among the states and territories of the Union in the manner prescribed by the constitution must not be overlooked. They are very obvious. Where such corporations are numerous and rich, it might be light; where none exist, it could not be collected; where they are few and poor, it would fall upon them with such weight as to involve annihilation. It cannot be supposed that the framers of the constitution intended that any tax should be apportioned, the collection of which on that principle would be attended with such results. The consequences are fatal to the proposition.

"To the question under consideration it

must be answered that the tax to which it relates is not a direct tax, but a duty or excise; that it was obligatory on the plaintiff to pay it.

"The other questions certified up are deemed to be sufficiently answered by the answers given to the first and sixth questions."

This opinion, it seems to me, closes the door to discussion in regard to the meaning of the word "direct" in the constitution, and renders unnecessary a resort to the conflicting opinions of the framers, or to the theories of the economists. It adopts that construction of the word which confines it to capitation taxes and a tax on land, and necessarily rejects the contention that that word was to be construed in accordance with the economic theory of shifting a tax from the shoulders of the person upon whom it was immediately levied to those of some other person. This decision moreover, is of great importance, because it is an authoritative reaffirmance of the Hylton Case, and an approval of the suggestions there made by the justices, and constitutes another sanction given by this court to the interpretation of the constitution adopted by the legislative, executive, and judicial departments of the government, and thereafter continuously acted upon.

Not long thereafter, in Bank v. Fenno, 8 Wall. 533, the question of the application of the word "direct" was again submitted to this court. The issue there was whether a tax on the circulation of state banks was "direct," within the meaning of the constitution. It was ably argued by the most distinguished counsel, Reverdy Johnson and Caleb Cushing representing the bank, and Attorney General Hoar, the United States. The brief of Mr. Cushing again presented nearly every point now urged upon our consideration. It cited copiously from the opinions of Adam Smith and others. The constitutionality of the tax was maintained by the government on the ground that the meaning of the word "direct" in the constitution, as interpreted by the Hylton Case, as enforced by the continuous legislative construction, and as sanctioned by the consensus of opinion already referred to, was finally settled. Those who assailed the tax there urged, as is done here, that the Hylton Case was not conclusive, because the only question decided was the particular matter at issue, and insisted that the suggestions of the judges were mere dicta, and not to be followed. They said that Hylton v. U. S. adjudged one point alone, which was that a tax on a carriage was not a direct tax, and that from the utterances of the judges in the case it was obvious that the general question of what was a direct tax was but crudely considered. Thus the argument there presented to this court the very view of the Hylton Case, which has been reiterated in the argument here, and which is sustained now. What did this court say then, speaking through Chief Justice Chase, as to these arguments? I take very fully from its opinion:

"Much diversity of opinion has always prevailed upon the question, what are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes which congress was authorized to impose was probably made with very little reference to their speculations. The great work of Adam Smith, the first comprehensive treatise on political economy in the English language, had then been recently published; but in this work, though there are passages which refer to the characteristic difference between direct and indirect taxation, there is nothing which affords any valuable light on the use of the words 'direct taxes,' in the constitution.

"We are obliged, therefore, to resort to historical evidence, and to seek the meaning of the words in the use and in the opinion of those whose relations to the government, and means of knowledge, warranted them in speaking with authority.

"And, considered in this light, the meaning and application of the rule, as to direct taxes, appears to us quite clear.

"It is, as we think, distinctly shown in every act of congress on the subject.

"In each of these acts a gross sum was laid upon the United States, and the total amount was apportioned to the several states according to their respective numbers of inhabitants, as ascertained by the last preceding census. Having been apportioned, provision was made for the imposition of the tax upon the subjects specified in the act, fixing its total sum.

"In 1798, when the first direct tax was imposed, the total amount was fixed at two millions of dollars; in 1813, the amount of the second direct tax was fixed at three millions; in 1815, the amount of the third at six millions, and it made an annual tax; in 1816, the provision making the tax annual was repealed by the repeal of the first section of the act of 1815, and the total amount was fixed for that year at three millions of dollars. No other direct tax was imposed until 1861, when a direct tax of twenty millions of dollars was laid, and made annual; but the provision making it annual was suspended, and no tax, except that first laid, was ever apportioned. In each instance the total sum was apportioned among the states by the constitutional rule, and was assessed at prescribed rates on the subjects of the tax. The subjects, in 1798, 1813, 1815, 1816, were lands, improvements, dwelling houses, and slaves; and in 1861, lands, improvements, and dwelling houses only. Under the act of 1798, slaves were assessed at fifty cents on each; under the other acts, according to valuation by assessors.

"This review shows that personal property,

contracts, occupations, and the like, have never been regarded by congress as proper subjects of direct tax. It has been supposed that slaves must be considered as an exception to this observation, but the exception is rather apparent than real. As persons, slaves were proper subjects of a capitation tax, which is described in the constitution as a direct tax; as property, they were, by the laws of some, if not most, of the states, classed as real property, descendible to heirs. Under the first view, they would be subject to the tax of 1798, as a capitation tax; under the latter, they would be subject to the taxation of the other years, as realty. That the latter view was that taken by the framers of the acts, after 1798, becomes highly probable, when it is considered that, in the states where slaves were held, much of the value which would otherwise have attached to land passed into the slaves. If, indeed, the land only had been valued without the slaves, the land would have been subject to much heavier proportional imposition in those states than in states where there were no slaves; for the proportion of tax imposed on each state was determined by population, without reference to the subjects on which it was to be assessed.

"The fact, then, that slaves were valued, under the acts referred to, far from showing, as some have supposed, that congress regarded personal property as a proper object of direct taxation, under the constitution, shows only that congress, after 1798, regarded slaves, for the purposes of taxation, as realty.

"It may be rightly affirmed, therefore, that, in the practical construction of the constitution by congress, direct taxes have been limited to taxes on land and appurtenances, and taxes on polls, or capitation taxes.

"And this construction is entitled to great consideration, especially in the absence of anything adverse to it in the discussions of the convention which framed, and of the conventions which ratified, the constitution. * * *

"This view received the sanction of this court two years before the enactment of the first law imposing direct taxes eo nomine."

The court then reviews the Hylton Case, repudiates the attack made upon it, reaffirms the construction placed on it by the legislative, executive, and judicial departments, and expressly adheres to the ruling in the Insurance Company Case, to which I have referred. Summing up, it said:

"It follows necessarily that the power to tax without apportionment extends to all other objects. Taxes on other objects are included under the heads of taxes not direct, duties, imposts, and excises, and must be laid and collected by the rule of uniformity. The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties. Certainly it is not, in the sense of the constitution, a direct tax. It may be said to come within the same category of taxation as the tax on incomes of insurance companies, which this court, at the last term, in the case of Insurance Co. v. Soule, held not to be a direct tax."

This case was, so far as the question of direct taxation is concerned, decided by an undivided court; for, although Mr. Justice Nelson dissented from the opinion, it was not on the ground that the tax was a direct tax, but on another question.

Some years after this decision the matter again came here for adjudication, in the case of Scholey v. Rew, 23 Wall. 331. The issue there involved was the validity of a tax placed by a United States statute on the right to take real estate by inheritance. The collection of the tax was resisted on the ground that it was direct. The brief expressly urged this contention, and said the tax in question was a tax on land, if ever there was one. It discussed the Hylton Case, referred to the language used by the various judges, and sought to place upon it the construction which we are now urged to give it, and which has been so often rejected by this court.

This court again by its unanimous judgment answered all these contentions. I quote its language:

"Support to the first objection is attempted to be drawn from that clause of the constitution which provides that direct taxes shall be apportioned among the several states which may be included within the Union, according to their respective numbers, and also from the clause which provides that no capitation or other direct tax shall be laid, unless in proportion to the census or amended enumeration; but it is clear that the tax or duty levied by the act under consideration is not a direct tax, within the meaning of either of those provisions. Instead of that, it is plainly an excise tax or duty, authorized by section 8 of article 1, which vests the power in congress to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare. * * *

"Indirect taxes, such as duties of impost and excises, and every other description of the same, must be uniform; and direct taxes must be laid in proportion to the census or enumeration, as remodeled in the fourteenth amendment. Taxes on lands, houses, and other permanent real estate have always been deemed to be direct taxes, and capitation taxes, by the express words of the constitution, are within the same category; but it never has been decided that any other legal exactions for the support of the federal government fall within the condition that, unless laid in proportion to numbers, that the assessment is invalid.

"Whether direct taxes, in the sense of the constitution, comprehend any other tax than a capitation tax and a tax on land, is a question not absolutely decided, nor is it necessary to determine it in the present case, as it is expressly decided that the term does not

include the tax on income, which cannot be distinguished in principle from a succession tax, such as the one involved in the present controversy."

What language could more clearly and forcibly reaffirm the previous rulings of the court upon this subject? What stronger indorsement could be given to the construction of the constitution which had been given in the Hylton Case, and which had been adopted and adhered to by all branches of the government almost from the hour of its establishment? It is worthy of note that the court here treated the decision in the Hylton Case as conveying the view that the only direct taxes were "taxes on land and appurtenance." In so doing it necessarily again adopted the suggestion of the justices there made, thus making them the adjudged conclusions of this court. It is too late now to destroy the force of the opinions in that case by qualifying them as mere dicta, when they have again and again been expressly approved by this court.

If there were left a doubt as to what this established construction is, it seems to be entirely removed by the case of Springer v. U. S., 102 U. S. 586. Springer was assessed for an income tax on his professional earnings and on the interest on United States bonds. He declined to pay. His real estate was sold in consequence. The suit involved the validity of the tax, as a basis for the sale. Again every question now presented was urged upon this court. The brief of the plaintiff in error, Springer, made the most copious references to the economic writers, continental and English. It cited the opinions of the framers of the constitution. It contained extracts from the journals of the convention, and marshaled the authorities in extensive and impressive array. It reiterated the argument against the validity of an income tax which included rentals. It is also asserted that the Hylton Case was not authority, because the expressions of the judges, in regard to anything except the carriage tax, were mere dicta.

The court adhered to the ruling announced in the previous cases, and held that the tax was not direct, within the meaning of the constitution. It re-examined and answered everything advanced here, and said, in summing up the case:

"Our conclusions are that direct taxes, within the meaning of the constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complained is within the category of an excise or duty."

The facts, then, are briefly these: At the very birth of the government a contention arose as to the meaning of the word "direct." That controversy was determined by the legislative and executive departments of the government. Their action came to this court for review, and it was approved. Every judge of this court who expressed an opinion made use of language which clearly showed that he thought the word "direct," in the constitution, applied only to capitation taxes and taxes directly on land. Thereafter the construction thus given was accepted everywhere as definitive. The matter came again and again to this court, and in every case the original ruling was adhered to. The suggestions made in the Hylton Case were adopted here, and in the last case here decided, reviewing all the others, this court said that direct taxes, within the meaning of the constitution, were only taxes on land, and capitation taxes. And now, after a hundred years, after long-continued action by other departments of the government, and after repeated adjudications of this court, this interpretation is overthrown, and the congress is declared not to have a power of taxation which may at some time, as it has in the past, prove necessary to the very existence of the government. By what process of reasoning is this to be done? By resort to theories, in order to construe the word "direct" in its economic sense, instead of in accordance with its meaning in the constitution, when the very result of the history which I have thus briefly recounted is to show that the economic construction of the word was repudiated by the framers themselves, and has been time and time again rejected by this court; by a resort to the language of the framers and a review of their opinions, although the facts plainly show that they themselves settled the question which the court now virtually unsettles. In view of all that has taken place, and of the many decisions of this court, the matter at issue here ought to be regarded as closed forever.

The injustice and harm which must always result from overthrowing a long and settled practice sanctioned by the decisions of this court could not be better illustrated than by the example which this case affords. Under the income-tax laws which prevailed in the past for many years, and which covered every conceivable source of income,—rentals from real estate,—and everything else, vast sums were collected from the people of the United States. The decision here rendered announces that those sums were wrongfully taken, and thereby, it seems to me, creates a claim, in equity and good conscience, against the government for an enormous amount of money. Thus, from the change of view by this court, it happens that an act of congress, passed for the purpose of raising revenue, in strict conformity with the practice of the government from the earliest time, and in accordance with the oft-repeated decisions of this court, furnishes the occasion for creating a claim against the government for hundreds of millions of dollars. I say, creating a claim, because, if the government be in good conscience bound to refund that which has been taken from the citizen in violation of the constitution, although the technical right may have disappeared by lapse of time, or because the decisions of this court have misled the citizen

to his grievous injury, the equity endures, and will present itself to the conscience of the government. This consequence shows how necessary it is that the court should not overthrow its past decisions. A distinguished writer aptly points out the wrong which must result to society from a shifting judicial interpretation. He says:

"If rules and maxims of law were to ebb and flow with the taste of the judge, or to assume that shape which, in his fancy, best becomes the times; if the decisions of one case were not to be ruled by or depend at all upon former determinations in other cases of a like nature,—I should be glad to know what person would venture to purchase an estate without first having the judgment of a court of justice respecting the identical title which he means to purchase. No reliance could be had upon precedents. Former resolutions upon titles of the same kind could afford him no assurance at all. Nay, even a decision of a court of justice upon the very identical title would be nothing more than a precarious, temporary security. The principle upon which it was founded might, in the course of a few years, become antiquated. The same title might be again drawn into dispute. The taste and fashion of the times might be improved, and on that ground a future judge might hold himself at liberty, if not consider it his duty, to pay as little regard to the maxims and decisions of his predecessor as that predecessor did to the maxims and decisions of those who went before him." Fearne, Rem. (London Ed. 1801) p. 264.

The disastrous consequences to flow from disregarding settled decisions, thus cogently described, must evidently become greatly magnified in a case like the present, when the opinion of the court affects fundamental principles of the government by denying an essential power of taxation long conceded to exist, and often exerted by congress. If it was necessary that the previous decisions of this court should be repudiated, the power to amend the constitution existed, and should have been availed of. Since the Hylton Case was decided, the constitution has been repeatedly amended. The construction which confined the word "direct" to capitation and land taxes was not changed by these amendments, and it should not now be reversed by what seems to me to be a judicial amendment of the constitution.

The finding of the court in this case that the inclusion of rentals from real estate in an income tax makes it direct, to that extent, is, in my judgment, conclusively denied by the authorities to which I have referred, and which establish the validity of an income tax in itself. Hence, I submit, the decision necessarily reverses the settled rule which it seemingly adopts in part. Can there be serious doubt that the question of the validity of an income tax, in which the rentals of real estate are included, is covered by the decisions which say that an income tax is generically indirect, and that, therefore, it is valid without apportionment? I mean, of course, could there be any such doubt, were it not for the present opinion of the court? Before undertaking to answer this question I deem it necessary to consider some arguments advanced or suggestions made.

(1) The opinions of Turgot and Smith and other economists are cited, and it is said their views were known to the framers of the constitution, and we are then referred to the opinions of the framers themselves. The object of the collocation of these two sources of authority is to show that there was a concurrence between them as to the meaning of the word "direct." But, in order to reach this conclusion, we are compelled to overlook the fact that this court has always held, as appears from the preceding cases, that the opinions of the economists threw little or no light on the interpretation of the word "direct," as found in the constitution. And the whole effect of the decisions of this court is to establish the proposition that the word has a different significance in the constitution from that which Smith and Turgot have given to it when used in a general economic sense. Indeed, it seems to me that the conclusion deduced from this line of thought itself demonstrates its own unsoundness. What is that conclusion? That the framers well understood the meaning of "direct."

Now, it seems evident that the framers, who well understood the meaning of this word, have themselves declared in the most positive way that it shall not be here construed in the sense of Smith and Turgot. The congress which passed the carriage tax act was composed largely of men who had participated in framing the constitution. That act was approved by Washington, who had presided over the deliberations of the convention. Certainly, Washington himself, and the majority of the framers, if they well understood the sense in which the word "direct" was used, would have declined to adopt and approve a taxing act which clearly violated the provisions of the constitution, if the word "direct," as therein used, had the meaning which must be attached to it if read by the light of the theories of Turgot and Adam Smith. As has already been noted, all the judges who expressed opinions in the Hylton Case suggested that "direct," in the constitutional sense, referred only to taxes on land and capitation taxes. Could they have possibly made this suggestion if the word had been used as Smith and Turgot used it? It is immaterial whether the suggestions of the judges were dicta or not. They could not certainly have made this intimation, if they understood the meaning of the word "direct" as being that which it must have imported if construed according to the writers mentioned. Take the language of Mr. Justice Paterson, "I never entertained a doubt that the principal, I will not say the only, objects that the framers of the consti-

tution contemplated as falling within the rule of apportionment were a capitation tax and a tax on land." He had borne a conspicuous part in the convention. Can we say that he understood the meaning of the framers, and yet, after the lapse of a hundred years, fritter away that language, uttered by him from this bench in the first great case in which this court was called upon to interpret the meaning of the word "direct"? It cannot be said that his language was used carelessly, or without a knowledge of its great import. The debate upon the passage of the carriage tax act had manifested divergence of opinion as to the meaning of the word "direct." The magnitude of the issue is shown by all contemporaneous authority to have been deeply felt, and its far-reaching consequence was appreciated. Those controversies came here for settlement, and were then determined with a full knowledge of the importance of the issues. They should not be now reopened.

The argument, then, it seems to me, reduces itself to this: That the framers well knew the meaning of the word "direct"; that, so well understanding it, they practically interpreted it in such a way as to plainly indicate that it had a sense contrary to that now given to it, in the view adopted by the court. Although they thus comprehended the meaning of the word and interpreted it at an early day, their interpretation is now to be overthrown by resorting to the economists whose construction was repudiated by them. It is thus demonstrable that the conclusion deduced from the premise that the framers well understood the meaning of the word "direct" involves a fallacy; in other words, that it draws a faulty conclusion, even if the predicate upon which the conclusion is rested be fully admitted. But I do not admit the premise. The views of the framers, cited in the argument, conclusively show that they did not well understand, but were in great doubt as to, the meaning of the word "direct." The use of the word was the result of a compromise. It was accepted as the solution of a difficulty which threatened to frustrate the hopes of those who looked upon the formation of a new government as absolutely necessary to escape the condition of weakness which the articles of confederation had shown. Those who accepted the compromise viewed the word in different lights, and expected different results to flow from its adoption. This was the natural result of the struggle which was terminated by the adoption of the provision as to representation and direct taxes. That warfare of opinion had been engendered by the existence of slavery in some of the states, and was the consequence of the conflict of interest thus brought about. In reaching a settlement, the minds of those who acted on it were naturally concerned in the main with the cause of the contention, and not with the other things which had been previously settled by the convention. Thus, while there was, in all probability, clearness of vision as to the meaning of the word "direct," in relation to its bearing on slave property, there was inattention in regard to other things, and there were therefore diverse opinions as to its proper signification. That such was the case in regard to many other clauses of the constitution has been shown to be the case by those great controversies of the past, which have been peacefully settled by the adjudications of this court. While this difference undoubtedly existed as to the effect to be given the word "direct," the consensus of the majority of the framers as to its meaning was shown by the passage of the carriage tax act. That consensus found adequate expression in the opinions of the justices in the Hylton Case, and in the decree of this court there rendered. The passage of that act, those opinions, and that decree, settled the proposition that the word applied only to capitation taxes and taxes on land.

Nor does the fact that there was difference in the minds of the framers as to the meaning of the word "direct" weaken the binding force of the interpretation placed upon that word from the beginning; for, if such difference existed, it is certainly sound to hold that a contemporaneous solution of a doubtful question, which has been often confirmed by this court, should not now be reversed. The framers of the constitution, the members of the earliest congress, the illustrious man first called to the office of chief executive, the jurists who first sat in this court, two of whom had borne a great part in the labors of the convention, all of whom dealt with this doubtful question, surely occupied a higher vantage ground for its correct solution than do those of our day. Here, then, is the dilemma: If the framers understood the meaning of the word "direct" in the constitution, the practical effect which they gave to it should remain undisturbed; if they were in doubt as to the meaning, the interpretation long since authoritatively affixed to it should be upheld.

(2) Nor do I think any light is thrown upon the question of whether the tax here under consideration is direct or indirect by referring to the principle of "taxation without representation," and the great struggle of our forefathers for its enforcement. It cannot be said that the congress which passed this act was not the representative body fixed by the constitution. Nor can it be contended that the struggle for the enforcement of the principle involved the contention that representation should be in exact proportion to the wealth taxed. If the argument be used in order to draw the inference that because, in this instance, the indirect tax imposed will operate differently through various sections of the country, therefore that tax should be treated as direct, it seems to me it is unsound. The right to tax, and not the effects which may follow from its lawful exercise,

is the only judicial question which this court is called upon to consider. If an indirect tax, which the constitution has not subjected to the rule of apportionment, is to be held to be a direct tax, because it will bear upon aggregations of property in different sections of the country according to the extent of such aggregations, then the power is denied to congress to do that which the constitution authorizes because the exercise of a lawful power is supposed to work out a result which, in the opinion of the court, was not contemplated by the fathers. If this be sound, then every question which has been determined in our past history is now still open for judicial reconstruction. The justness of tariff legislation has turned upon the assertion on the one hand, denied on the other, that it operated unequally on the inhabitants of different sections of the country. Those who opposed such legislation have always contended that its necessary effect was not only to put the whole burden upon one section, but also to directly enrich certain of our citizens at the expense of the rest, and thus build up great fortunes, to the benefit of the few and the detriment of the many. Whether this economic contention be true or untrue is not the question. Of course, I intimate no view on the subject. Will it be said that if, to-morrow, the personnel of this court should be changed, it could deny the power to enact tariff legislation which has been admitted to exist in congress from the beginning, upon the ground that such legislation beneficially affects one section or set of people to the detriment of others, within the spirit of the constitution, and therefore constitutes a direct tax?

(3) Nor, in my judgment, does any force result from the argument that the framers expected direct taxes to be rarely resorted to, and, as the present tax was imposed without public necessity, it should be declared void.

It seems to me that this statement begs the whole question, for it assumes that the act now before us levies a direct tax, whereas the question whether the tax is direct or not is the very issue involved in this case. If congress now deems it advisable to resort to certain forms of indirect taxation which have been frequently, though not continuously, availed of in the past, I cannot see that its so doing affords any reason for converting an indirect into a direct tax in order to nullify the legislative will. The policy of any particular method of taxation, or the presence of an exigency which requires its adoption, is a purely legislative question. It seems to me that it violates the elementary distinction between the two departments of the government to allow an opinion of this court upon the necessity or expediency of a tax to affect or control our determination of the existence of the power to impose it.

But I pass from these considerations to approach the question whether the inclusion of rentals from real estate in an income tax renders such a tax to that extent "direct" under the constitution, because it constitutes the imposition of a direct tax on the land itself.

Does the inclusion of the rentals from real estate in the sum going to make up the aggregate income from which (in order to arrive at taxable income) is to be deducted insurance, repairs, losses in business, and $4,000 exemption, make the tax on income so ascertained a direct tax on such real estate?

In answering this question, we must necessarily accept the interpretation of the word "direct" authoritatively given by the history of the government and the decisions of this court just cited. To adopt that interpretation for the general purposes of an income tax, and then repudiate it because of one of the elements of which it is composed, would violate every elementary rule of construction. So, also, to seemingly accept that interpretation, and then resort to the framers and the economists in order to limit its application and give it a different significance, is equivalent to its destruction, and amounts to repudiating it without directly doing so. Under the settled interpretation of the word, we ascertain whether a tax be "direct" or not by considering whether it is a tax on land or a capitation tax. And the tax on land, to be within the provision for apportionment, must be direct. Therefore we have two things to take into account: Is it a tax on land, and is it direct thereon, or so immediately on the land as to be equivalent to a direct levy upon it? To say that any burden on land, even though indirect, must be apportioned, is not only to incorporate a new provision in the constitution, but is also to obliterate all the decisions to which I have referred, by construing them as holding that, although the constitution forbids only a direct tax on land without apportionment, it must be so interpreted as to bring an indirect tax on land within its inhibition.

It is said that a tax on the rentals is a tax on the land, as if the act here under consideration imposed an immediate tax on the rentals. This statement, I submit, is a misconception of the issue. The point involved is whether a tax on net income, when such income is made up by aggregating all sources of revenue and deducting repairs, insurance, losses in business, exemptions, etc., becomes, to the extent to which real-estate revenues may have entered into the gross income, a direct tax on the land itself. In other words, does that which reaches an income, and thereby reaches rentals indirectly, and reaches the land by a double indirection, amount to a direct levy on the land itself? It seems to me the question, when thus accurately stated, furnishes its own negative response. Indeed, I do not see how the issue can be stated precisely and logically without making it apparent on its face that the inclu-

sion of rental from real property in income is nothing more than an indirect tax upon the land.

It must be borne in mind that we are dealing not with the want of power in congress to assess real estate at all. On the contrary, as I have shown at the outset, congress has plenary power to reach real estate, both directly and indirectly. If it taxes real estate directly, the constitution commands that such direct imposition shall be apportioned. But because an excise or other indirect tax, imposed without apportionment, has an indirect effect upon real estate, no violation of the constitution is committed, because the constitution has left congress untrammeled by any rule of apportionment as to indirect taxes,—imposts, duties, and excises. The opinions in the Hylton Case, so often approved and reiterated, the unanimous views of the text writers, all show that a tax on land, to be direct, must be an assessment of the land itself, either by quantity or valuation. Here there is no such assessment. It is well also to bear in mind, in considering whether the tax is direct on the land, the fact that if land yields no rental it contributes nothing to the income. If it is vacant, the law does not force the owner to add the rental value to his taxable income. And so it is if he occupies it himself.

The citation made by counsel from Coke on Littleton, upon which so much stress is laid, seems to me to have no relevancy. The fact that where one delivers or agrees to give or transfer land, with all the fruits and revenues, it will be presumed to be a conveyance of the land, in no way supports the proposition that an indirect tax on the rental of land is a direct burden on the land itself.

Nor can I see the application of Brown v. Maryland; Weston v. City Council; Dobbins v. Commissioners; Almy v. California; Cook v. Pennsylvania; Railroad Co. v. Jackson; Philadelphia & S. S. S. Co. v. Pennsylvania; Leloup v. Mobile; Telegraph Co. v. Adams. All these cases involved the question whether, under the constitution, if no power existed to tax at all, either directly or indirectly, an indirect tax would be unconstitutional. These cases would be apposite to this if congress had no power to tax real estate. Were such the case, it might be that the imposition of an excise by congress which reached real estate indirectly would necessarily violate the constitution, because, as it had no power in the premises, every attempt to tax, directly or indirectly, would be null. Here, on the contrary, it is not denied that the power to tax exists in congress, but the question is, is the tax direct or indirect, in the constitutional sense?

But it is unnecessary to follow the argument further; for, if I understand the opinions of this court already referred to, they absolutely settle the proposition that an inclusion of the rentals of real estate in an income tax does not violate the constitution. At the risk of repetition, I propose to go over the cases again for the purpose of demonstrating this. In doing so, let it be understood at the outset that I do not question the authority of Cohens v. Virginia or Carroll v. Carroll's Lessee or any other of the cases referred to in argument of counsel. These great opinions hold that an adjudication need not be extended beyond the principles which it decides. While conceding this, it is submitted that, if decided cases do directly, affirmatively, and necessarily, in principle, adjudicate the very question here involved, then, under the very text of the opinions referred to by the court, they should conclude this question. In the first case, that of Hylton, is there any possibility, by the subtlest ingenuity, to reconcile the decision here announced with what was there established?

In the second case (Insurance Co. v. Soule) the levy was upon the company, its premiums, its dividends, and net gains from all sources. The case was certified to this court, and the statement made by the judges in explanation of the question which they propounded says:

"The amount of said premiums, dividends, and net gains were truly stated in said lists or returns." Original Record, p. 27.

It will be thus seen that the issue there presented was not whether an income tax on business gains was valid, but whether an income tax on gains from business and all other net gains was constitutional. Under this state of facts, the question put to the court was—

"Whether the taxes paid by the plaintiff, and sought to be recovered back, in this action, are not direct taxes within the meaning of the constitution of the United States."

This tax covered revenue of every possible nature, and it therefore appears self-evident that the court could not have upheld the statute without deciding that the income derived from realty, as well as that derived from every other source, might be taxed without apportionment. It is obvious that, if the court had considered that any particular subject-matter which the statute reached was not constitutionally included, it would have been obliged, by every rule of safe judicial conduct, to qualify its answer as to this particular subject.

It is impossible for me to conceive that the court did not embrace in its ruling the constitutionality of an income tax which included rentals from real estate, since, without passing upon that question, it could not have decided the issue presented. And another reason why it is logically impossible that this question of the validity of the inclusion of the rental of real estate in an income tax could have been overlooked by the court is found in the fact, to which I have already adverted, that this was one of the principal points urged upon its attention, and the argument covered all the ground which has

been occupied here,—indeed, the very citation from Coke upon Littleton, now urged as conclusive, was there made also in the brief of counsel. And although the return of income, involved in that case, was made "in block," the very fact that the burden of the argument was that to include rentals from real estate, in income subject to taxation, made such tax pro tanto direct, seems to me to indicate that such rentals had entered into the return made by the corporation.

Again, in the case of Scholey v. Rew, the tax in question was laid directly on the right to take real estate by inheritance,—a right which the United States had no power to control. The case could not have been decided, in any point of view, without holding a tax upon that right was not direct, and that, therefore, it could be levied without apportionment. It is manifest that the court could not have overlooked the question whether this was a direct tax on the land or not, because in the argument of counsel it was said, if there was any tax in the world that was a tax on real estate which was direct, that was the one. The court said it was not, and sustained the law. I repeat that the tax there was put directly upon the right to inherit, which congress had no power to regulate or control. The case was therefore greatly stronger than that here presented, for congress has a right to tax real estate directly with apportionment. That decision cannot be explained away by saying that the court overlooked the fact that congress had no power to tax the devolution of real estate, and treated it as a tax on such devolution. Will it be said, of the distinguished men who then adorned this bench, that, although the argument was pressed upon them that this tax was levied directly on the real estate, they ignored the elementary principle that the control of the inheritance of realty is a state and not a federal function? But, even if the case proceeded upon the theory that the tax was on the devolution of the real estate, and was therefore not direct, is it not absolutely decisive of this controversy? If to put a burden of taxation on the right to take real estate by inheritance reaches realty only by indirection, how can it be said that a tax on the income, the result of all sources of revenue, including rentals, after deducting losses and expenses, which thus reaches the rentals indirectly, and the real estate indirectly through the rentals, is a direct tax on the real estate itself?

So, it is manifest in the Springer Case that the same question was necessarily decided. It seems obvious that the court intended in that case to decide the whole question, including the right to tax rental from real estate without apportionment. It was elaborately and carefully argued there that as the law included the rentals of land in the income taxed, and such inclusion was unconstitutional, this, therefore, destroyed that part of the law which imposed the tax on the revenues of personal property. Will it be said, in view of the fact that in this very case four of the judges of this court think that the inclusion of the rentals from real estate in an income tax renders the whole law invalid, that the question of the inclusion of the rentals was of no moment there, because the return there did not contain a mention of such rentals? Were the great judges who then composed this court so neglectful that they did not see the importance of a question which is now considered by some of its members so vital that the result in their opinion is to annul the whole law, more especially when that question was pressed upon the court in argument with all possible vigor and earnestness? But I think that the opinion in the Springer Case clearly shows that the court did consider this question of importance, that it did intend to pass upon it, and that it deemed that it had decided all the questions affecting the validity of an income tax in passing upon the main issue, which included the others as the greater includes the less.

I can discover no principle upon which these cases can be considered as any less conclusive of the right to include rentals of land in the concrete result, income, than they are as to the right to levy a general income tax. Certainly, the decisions which hold that an income tax as such is not direct, decide on principle that to include the rentals of real estate in an income tax does not make it direct. If embracing rentals in income makes a tax on income to that extent a "direct" tax on the land, then the same word, in the same sentence of the constitution, has two wholly distinct constitutional meanings, and signifies one thing when applied to an income tax generally, and a different thing when applied to the portion of such a tax made up in part of rentals. That is to say, the word means one thing when applied to the greater, and another when applied to the lesser, tax.

My inability to agree with the court in the conclusions which it has just expressed causes me much regret. Great as is my respect for any view by it announced, I cannot resist the conviction that its opinion and decree in this case virtually annuls its previous decisions in regard to the powers of congress on the subject of taxation, and is therefore fraught with danger to the court, to each and every citizen, and to the republic. The conservation and orderly development of our institutions rest on our acceptance of the results of the past, and their use as lights to guide our steps in the future. Teach the lesson that settled principles may be overthrown at any time, and confusion and turmoil must ultimately result. In the discharge of its function of interpreting the constitution this court exercises an august power. It sits removed from the contentions of political parties and the animosities of factions. It seems to me that the accom-

plishment of its lofty mission can only be secured by the stability of its teachings and the sanctity which surrounds them. If the permanency of its conclusions is to depend upon the personal opinions of those who, from time to time, may make up its membership, it will inevitably become a theater of political strife, and its action will be without coherence or consistency. There is no great principle of our constitutional law, such as the nature and extent of the commerce power, or the currency power, or other powers of the federal government, which has not been ultimately defined by the adjudications of this court after long and earnest struggle. If we are to go back to the original sources of our political system, or are to appeal to the writings of the economists in order to unsettle all these great principles, everything is lost, and nothing saved to the people. The rights of every individual are guarantied by the safeguards which have been thrown around them by our adjudications. If these are to be assailed and overthrown, as is the settled law of income taxation by this opinion, as I understand it, the rights of property, so far as the federal constitution is concerned, are of little worth. My strong convictions forbid that I take part in a conclusion which seems to me so full of peril to the country. I am unwilling to do so, without reference to the question of what my personal opinion upon the subject might be if the question were a new one, and was thus unaffected by the action of the framers, the history of the government, and the long line of decisions by this court. The wisdom of our forefathers in adopting a written constitution has often been impeached upon the theory that the interpretation of a written instrument did not afford as complete protection to liberty as would be enjoyed under a constitution made up of the traditions of a free people. Writing, it has been said, does not insure greater stability than tradition does, while it destroys flexibility. The answer has always been that by the foresight of the fathers the construction of our written constitution was ultimately confided to this body, which, from the nature of its judicial structure, could always be relied upon to act with perfect freedom from the influence of faction, and to preserve the benefits of consistent interpretation. The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our constitution will, in my judgment, be bereft of value, and become a most dangerous instrument to the rights and liberties of the people.

In regard to the right to include in an income tax the interest upon the bonds of municipal corporations, I think the decisions of this court, holding that the federal government is without power to tax the agencies of the state government, embrace such bonds, and that this settled line of authority is conclusive upon my judgment here. It determines the question that, where there is no power to tax for any purpose whatever, no direct or indirect tax can be imposed. The authorities cited in the opinion are decisive of this question. They are relevant to one case, and not to the other, because, in the one case, there is full power in the federal government to tax, the only controversy being whether the tax imposed is direct or indirect; while in the other there is no power whatever in the federal government, and therefore the levy, whether direct or indirect, is beyond the taxing power.

Mr. Justice HARLAN authorizes me to say that he concurs in the views herein expressed.

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LOAN ASSOCIATION v. TOPEKA.[1]

(20 Wall. 655.)

Supreme Court of the United States. Oct., 1874.

Error to the circuit court for the district of Kansas.

This was an action instituted by the Citizens' Saving & Loan Association of Cleveland against the city of Topeka on interest coupons attached to bonds issued by the defendant under Acts Kan. Feb. 29, 1872, and March 2, 1872, empowering cities to issue bonds for the encouragement and establishment of manufactories therein, and such other enterprises as may tend to develop and improve them. A demurrer interposed to the declaration by the defendant was sustained, and a judgment was rendered in favor of defendant, and plaintiff brought error. Affirmed.

Alfred Ennis, for plaintiff in error. Ross, Burns, and A. L. Williams, contra.

Mr. Justice MILLER delivered the opinion of the court.

Two grounds are taken in the opinion of the circuit judge and in the argument of counsel for defendant, on which it is insisted that the section of the statute of February 29th, 1872, on which the main reliance is placed to issue the bonds, is unconstitutional.

The first of these is, that by section five of article twelve of the constitution of that state it is declared that provision shall be made by general law for the organization of cities, towns, and villages; and their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, shall be so restricted as to prevent the abuse of such power.

The argument is that the statute in question is void because it authorizes cities and towns to contract debts, and does not contain any restriction on the power so conferred. But whether the statute which confers power to contract debts should always contain some limitation or restriction, or whether a general restriction applicable to all cases should be passed, and whether in the absence of both the grant of power to contract is wholly void, are questions whose solution we prefer to remit to the state courts, as in this case we find ample reason to sustain the demurrer on the second ground on which it is argued by counsel and sustained by the circuit court.

That proposition is that the act authorizes the towns and other municipalities to which it applies, by issuing bonds or loaning their credit, to take the property of the citizen under the guise of taxation to pay these bonds, and use it in aid of the enterprises of others which are not of a public character, thus perverting the right of taxation, which can only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain.

The proposition as thus broadly stated is not new, nor is the question which it raises difficult of solution.

If these municipal corporations, which are in fact subdivisions of the state, and which for many reasons are vested with quasi legislative powers, have a fund or other property out of which they can pay the debts which they contract, without resort to taxation, it may be within the power of the legislature of the state to authorize them to use it in aid of projects strictly private or personal, but which would in a secondary manner contribute to the public good; or where there is property or money vested in a corporation of the kind for a particular use, as public worship or charity, the legislature may pass laws authorizing them to make contracts in reference to this property, and incur debts payable from that source.

But such instances are few and exceptional, and the proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid in future, not limited to payment from some other source, imply an obligation to pay by taxation.

It follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it.

If this were not so, these corporations could make valid promises, which they have no means of fulfilling, and on which even the legislature that created them can confer no such power. The validity of a contract which can only be fulfilled by a resort to taxation, depends on the power to levy the tax for that purpose.[2]

It is, therefore, to be inferred that when the legislature of the state authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference.

With these remarks and with the reference to the authorities which support them, we assume that unless the legislature of Kansas had the right to authorize the counties and towns in that state to levy taxes to be used in aid of manufacturing enterprises, conducted by individuals, or private corporations, for purposes of gain, the law is void, and the bonds issued under it are also void. We

[1] Dissenting opinion of Mr. Justice Clifford omitted.

[2] Sharpless v. Mayor, 21 Pa. St. 147, 167; Hanson v. Vernon, 27 Iowa, 28; Allen v. Inhabitants of Jay, 60 Me. 127; Lowell v. City of Boston, 111 Mass. 454; Whiting v. Fond du Lac, 25 Wis. 188.

proceed to the inquiry whether such a power exists in the legislature of the state of Kansas.

We have already said the question is not new. The subject of the aid voted to railroads by counties and towns has been brought to the attention of the courts of almost every state in the Union. It has been thoroughly discussed and is still the subject of discussion in those courts. It is quite true that a decided preponderance of authority is to be found in favor of the proposition that the legislatures of the states, unless restricted by some special provisions of their constitutions, may confer upon these municipal bodies the right to take stock in corporations created to build railroads, and to lend their credit to such corporations. Also to levy the necessary taxes on the inhabitants, and on property within their limits subject to general taxation, to enable them to pay the debts thus incurred. But very few of these courts have decided this without a division among the judges of which they were composed, while others have decided against the existence of the power altogether.[3]

In all these cases, however, the decision has turned upon the question whether the taxation by which this aid was afforded to the building of railroads was for a public purpose. Those who came to the conclusion that it was, held the laws for that purpose valid. Those who could not reach that conclusion held them void. In all the controversy this has been the turning-point of the judgments of the courts. And it is safe to say that no court has held debts created in aid of railroad companies, by counties or towns, valid on any other ground than that the purpose for which the taxes were levied was a public use, a purpose or object which it was the right and the duty of state governments to assist by money raised from the people by taxation. The argument in opposition to this power has been, that railroads built by corporations organized mainly for purposes of gain—the roads which they built being under their control, and not that of the state—were private and not public roads, and the tax assessed on the people went to swell the profits of individuals and not to the good of the state, or the benefit of the public, except in a remote and collateral way. On the other hand it was said that roads, canals, bridges, navigable streams, and all other highways had in all times been matter of public concern. That such channels of travel and of the carrying business had always been established, improved, regulated by the state, and that the railroad had not lost this character because constructed by individual enterprise, aggregated into a corporation.

We are not prepared to say that the latter view of it is not the true one, especially as there are other characteristics of a public nature conferred on these corporations, such as the power to obtain right of way, their subjection to the laws which govern common carriers, and the like, which seem to justify the proposition. Of the disastrous consequences which have followed its recognition by the courts and which were predicted when it was first established there can be no doubt.

We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the state legislature to tax the people, but conceded that where the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private right.[4]

It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer

[3] State v. Wapello Co., 9 Iowa, 308; Hanson v. Vernon, 27 Iowa, 28; Sharpless v. Mayor, 21 Pa. St. 147; Whiting v. Fond du Lac, 25 Wis. 188.

[4] Olcott v. Supervisors, 16 Wall. 689; People v. Salem, 20 Mich. 452; Jenkins v. Andover, 103 Mass. 94; Dill. Mun. Corp. § 587; 2 Redf. R. R. 398, rule 2.

be his, but should henceforth be the property of B.[5]

Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the national defence, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government.

The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of McCulloch v. Maryland, 4 Wheat. 431, that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent. imposed by the United States on the circulation of all other banks than the National banks, drove out of existence every state bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

Nor is it taxation. A "tax," says Webster's Dictionary, "is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or state." "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes." Cooley, Const. Lim. 479.

Coulter, J., in Northern Liberties v. St. John's Church, 13 Pa. St. 104,[6] says, very forcibly, "I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations—that they are imposed for a public purpose."

We have established, we think, beyond cavil that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.

It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.

But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town.

A reference to one or two cases adjudicated by courts of the highest character will be sufficient, if any authority were needed, to sustain us in this proposition.

In the case of Allen v. Inhabitants of Jay, 60 Me. 124, the town meeting had voted to loan their credit to the amount of $10,000, to Hutchins and Lane, if they would invest $12,000 in a steam saw-mill, grist-mill, and box-factory machinery, to be built in that town by them. There was a provision to secure the town by mortgage on the mill, and the selectmen were authorized to issue town bonds for the amount of the aid so voted. Ten of the taxable inhabitants of the town filed a bill to enjoin the selectmen from issuing the bonds.

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[5] Whiting v. Fond du Lac, 25 Wis. 188; Cooley, Const. Lim. 129, 175, 487; Dill. Mun. Corp. § 587.

[6] See, also, Pray v. Northern Liberties, 31 Pa. St. 69; In re New York, 11 Johns. 77; Camden v. Allen, 26 N. J. Law, 398; Sharpless v. Mayor, supra; Hanson v. Vernon, 27 Iowa, 47; Whiting v. Fond du Lac, 25 Wis. 188.

The supreme judicial court of Maine, in an able opinion by Chief Justice Appleton, held that this was not a public purpose, and that the town could levy no taxes on the inhabitants in aid of the enterprise, and could, therefore, issue no bonds, though a special act of the legislature had ratified the vote of the town, and they granted the injunction as prayed for.

Shortly after the disastrous fire in Boston, in 1872, which laid an important part of that city in ashes, the governor of the state convened the legislative body of Massachusetts, called the "General Court," for the express purpose of affording some relief to the city and its people from the sufferings consequent on this great calamity. A statute was passed, among others, which authorized the city to issue its bonds to an amount not exceeding twenty millions of dollars, which bonds were to be loaned, under proper guards for securing the city from loss, to the owners of the ground whose buildings had been destroyed by fire, to aid them in rebuilding.

In the case of Lowell v. City of Boston (111 Mass. 454), in the supreme judicial court of Massachusetts, the validity of this act was considered. We have been furnished a copy of the opinion, though it is not yet reported in the regular series of that court. The American Law Review for July, 1873, says that the question was elaborately and ably argued. The court, in an able and exhaustive opinion, decided that the law was unconstitutional, as giving a right to tax for other than a public purpose.

The same court had previously decided, in the case of Jenkins v. Anderson, 103 Mass. 74, that a statute authorizing the town authorities to aid by taxation a school established by the will of a citizen, and governed by trustees selected by the will, was void because the school was not under the control of the town officers, and was not, therefore, a public purpose for which taxes could be levied on the inhabitants.

The same principle precisely was decided by the state court of Wisconsin in the case of Curtis v. Whipple, 24 Wis. 350. In that case a special statute which authorized the town to aid the Jefferson Liberal Institute was declared void because, though a school of learning, it was a private enterprise not under the control of the town authorities. In the subsequent case of Whiting v. Fond du Lac, already cited, the principle is fully considered and reaffirmed.

These cases are clearly in point, and they assert a principle which meets our cordial approval.

We do not attach any importance to the fact that the town authorities paid one instalment of interest on these bonds. Such a payment works no estoppel. If the legislature was without power to authorize the issue of these bonds, and its statute attempting to confer such authority is void, the mere payment of interest, which was equally unauthorized, cannot create of itself a power to levy taxes, resting on no other foundation than the fact that they have once been illegally levied for that purpose.

The act of March 2, 1872, concerning internal improvements, can give no assistance to these bonds. If we could hold that the corporation for manufacturing wrought-iron bridges was within the meaning of the statute, which seems very difficult to do, it would still be liable to the objection that money raised to assist the company was not for a public purpose, as we have already demonstrated.

Judgment affirmed.

Mr. Justice CLIFFORD, dissenting.

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"THE CIVIL RIGHTS CASES." [1]

UNITED STATES v. STANLEY.

[On a Certificate of Division in Opinion between the Judges of the Circuit Court of the United States for the District of Kansas.]

UNITED STATES v. RYAN.

[In Error to the Circuit Court of the United States for the District of California.]

UNITED STATES v. NICHOLS.

[On a Certificate of Division in Opinion between the Judges of the Circuit Court of the United States for the Western District of Missouri.]

UNITED STATES v. SINGLETON.

[On a Certificate of Division in Opinion between the Judges of the Circuit Court of the United States for the Southern District of New York.]

ROBINSON and wife v. MEMPHIS & CHARLESTON R. CO.

[In Error to the Circuit Court of the United State for the Western District of Tennessee.]

(3 Sup. Ct. 18, 109 U. S. 3.)

Supreme Court of the United States. Oct. 15, 1883.

Sol. Gen. Phillips, for plaintiff, the United States. No counsel for defendants, Stanley, Ryan, Nichols, and Singleton. Wm. M. Randolph, for plaintiffs in error, Robinson and wife. W. Y. C Humes, for defendant in error, the Memphis & Charleston R. Co.

BRADLEY, J. These cases are all founded on the first and second sections of the act of congress known as the "Civil Rights Act," passed March 1, 1875, entitled "An act to protect all citizens in their civil and legal rights." 18 Stat. 335. Two of the cases, those against Stanley and Nichols, are indictments for denying to persons of color the accommodations and privileges of an inn or hotel; two of them, those against Ryan and Singleton, are, one an information, the other an indictment, for denying to individuals the privileges and accommodations of a theater, the information against Ryan being for refusing a colored person a seat in the dress circle of Maguire's theater in San Francisco; and the indictment against Singleton being for denying to another person, whose color is not stated, the full enjoyment of the accommodations of the theater known as the Grand Opera House in New York, "said denial not being made for any reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude." The case of Robinson and wife against the Memphis & Charleston Railroad Company was an action brought in the circuit court of the United States for the Western district of Tennessee, to recover the penalty of $500 given by the second section of the act; and the gravamen was the refusal by the conductor of the railroad company to allow the wife to ride in the ladies' car, for the reason, as stated in one of the counts, that she was a person of African descent. The jury rendered a verdict for the defendants in this case upon the merits under a charge of the court, to which a bill of exceptions was taken by the plaintiffs. The case was tried on the assumption by both parties of the validity of the act of congress; and the principal point made by the exceptions was that the judge allowed evidence to go to the jury tending to show that the conductor had reason to suspect that the plaintiff, the wife, was an improper person, because she was in company with a young man whom he supposed to be a white man, and on that account inferred that there was some improper connection between them; and the judge charged the jury, in substance, that if this was the conductor's bona fide reason for excluding the woman from the car, they might take it into consideration on the question of the liability of the company. The case is brought here by writ of error at the suit of the plaintiffs. The cases of Stanley, Nichols, and Singleton come up on certificates of division of opinion between the judges below as to the constitutionality of the first and second sections of the act referred to; and the case of Ryan, on a writ of error to the judgment of the circuit court for the district of California sustaining a demurrer to the information.

It is obvious that the primary and important question in all the cases is the constitutionality of the law; for if the law is unconstitutional none of the prosecutions can stand.

The sections of the law referred to provide as follows:

"Section 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

"Sec. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of $500 to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall, also, for every such offense, be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than $500 nor more

[1] Dissenting opinion of Mr. Justice Harlan omitted.

than $1,000, or shall be imprisoned not less than 30 days nor more than one year: Provided, that all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by state statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this provision shall not apply to criminal proceedings, either under this act or the criminal law of any state: And provided, further, that a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively."

Are these sections constitutional? The first section, which is the principal one, cannot be fairly understood without attending to the last clause, which qualifies the preceding part. The essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theaters; but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. In other words, it is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theaters, and other places of public amusement, no distinction shall be made between citizens of different race or color, or between those who have, and those who have not, been slaves. Its effect is to declare that in all inns, public conveyances, and places of amusement, colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement, as are enjoyed by white citizens; and vice versa. The second section makes it a penal offense in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations or privileges mentioned in the first section.

Has congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the constitution before the adoption of the last three amendments. The power is sought, first, in the fourteenth amendment, and the views and arguments of distinguished senators, advanced while the law was under consideration, claiming authority to pass it by virtue of that amendment, are the principal arguments adduced in favor of the power. We have carefully considered those arguments, as was due to the eminent ability of those who put them forward, and have felt, in all its force, the weight of authority which always invests a law that congress deems itself competent to pass. But the responsibility of an independent judgment is now thrown upon this court; and we are bound to exercise it according to the best lights we have.

The first section of the fourteenth amendment,—which is the one relied on,—after declaring who shall be citizens of the United States, and of the several states, is prohibitory in its character, and prohibitory upon the states. It declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere brutum fulmen, the last section of the amendment invests congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state law and state acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon congress, and this is the whole of it. It does not invest congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the fourteenth amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect of the amendment may be found in U. S. v. Cruikshank, 92 U. S. 542; Virginia v. Rives, 100 U. S. 313, and Ex parte Virginia, Id. 339.

An apt illustration of this distinction may be found in some of the provisions of the original constitution. Take the subject of

contracts, for example. The constitution prohibited the states from passing any law impairing the obligation of contracts. This did not give to congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide remedies by which the impairment of contracts by state legislation might be counteracted and corrected; and this power was exercised. The remedy which congress actually provided was that contained in the twenty-fifth section of the judiciary act of 1789, giving to the supreme court of the United States jurisdiction by writ of error to review the final decisions of state courts whenever they should sustain the validity of a state statute or authority, alleged to be repugnant to the constitution or laws of the United States. By this means, if a state law was passed impairing the obligation of a contract, and the state tribunals sustained the validity of the law, the mischief could be corrected in this court. The legislation of congress, and the proceedings provided for under it, were corrective in their character. No attempt was made to draw into the United States courts the litigation of contracts generally, and no such attempt would have been sustained. We do not say that the remedy provided was the only one that might have been provided in that case. Probably congress had power to pass a law giving to the courts of the United States direct jurisdiction over contracts alleged to be impaired by a state law; and, under the broad provisions of the act of March 3, 1875, giving to the circuit courts jurisdiction of all cases arising under the constitution and laws of the United States, it is possible that such jurisdiction now exists. But under that or any other law, it must appear, as well by allegation as proof at the trial, that the constitution had been violated by the action of the state legislature. Some obnoxious state law passed, or that might be passed, is necessary to be assumed in order to lay the foundation of any federal remedy in the case, and for the very sufficient reason that the constitutional prohibition is against state laws impairing the obligation of contracts.

And so in the present case, until some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the fourteenth amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity, for the prohibitions of the amendment are against state laws and acts done under state authority. Of course, legislation may and should be provided in advance to met the exigency when it arises, but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, state laws or state action of some kind adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty, and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make congress take the place of the state legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty, and property (which include all civil rights that men have) are by the amendment sought to be protected against invasion on the part of the state without due process of law, congress may, therefore, provide due process of law for their vindication in every case; and that, because the denial by a state to any persons of the equal protection of the laws is prohibited by the amendment, therefore congress may establish laws for their equal protection. In fine, the legislation which congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the states may adopt or enforce, and which by the amendment they are prohibited from making or enforcing, or such acts and proceedings as the states may commit or take, and which by the amendment they are prohibited from committing or taking. It is not necessary for us to state, if we could, what legislation would be proper for congress to adopt. It is sufficient for us to examine whether the law in question is of that character.

An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the fourteenth amendment on the part of the states. It is not predicated on any such view. It proceeds ex directo to declare that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the states; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in states which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws as to those which arise in states that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the state or its authorities.

If this legislation is appropriate for en-

forcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not congress, with equal show of authority, enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? If it is supposable that the states may deprive persons of life, liberty, and property without due process of law, (and the amendment itself does suppose this,) why should not congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances, and theaters. The truth is that the implication of a power to legislate in this manner is based upon the assumption that if the states are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon congress to enforce the prohibition, this gives congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such state legislation or action. The assumption is certainly unsound. It is repugnant to the tenth amendment of the constitution, which declares that powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.

We have not overlooked the fact that the fourth section of the act now under consideration has been held by this court to be constitutional. That section declares "that no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any state, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars." In Ex parte Virginia, 100 U. S. 339, it was held that an indictment against a state officer under this section for excluding persons of color from the jury list is sustainable. But a moment's attention to its terms will show that the section is entirely corrective in its character. Disqualifications for service on juries are only created by the law, and the first part of the section is aimed at certain disqualifying laws, namely, those which make mere race or color a disqualification; and the second clause is directed against those who, assuming to use the authority of the state government, carry into effect such a rule of disqualification. In the Virginia case, the state, through its officer, enforced a rule of disqualification which the law was intended to abrogate and counteract. Whether the statute-book of the state actually laid down any such rule of disqualification or not, the state, through its officer, enforced such a rule; and it is against such state action, through its officers and agents, that the last clause of the section is directed. This aspect of the law was deemed sufficient to divest it of any unconstitutional character, and makes it differ widely from the first and second sections of the same act which we are now considering.

These sections, in the objectionable features before referred to, are different also from the law ordinarily called the "Civil Rights Bill," originally passed April 9, 1866, and re-enacted with some modifications in sections 16, 17, 18, of the enforcement act, passed May 31, 1870. That law, as re-enacted, after declaring that all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding, proceeds to enact that any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any state or territory to the deprivation of any rights secured or protected by the preceding section, (above quoted,) or to different punishment, pains, or penalties, on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and subject to fine and imprisonment as specified in the act. This law is clearly corrective in its character, intended to counteract and furnish redress against state laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified. In the Revised Statutes, it is true, a very important clause, to-wit, the words "any law, statute, ordinance, regulation, or custom to the contrary notwithstanding," which gave the declaratory section its point and effect, are omitted; but the penal part, by which the declaration is enforced, and which is really the effective part of the law, retains the reference to state laws by making the penalty apply only to those who should subject parties to a deprivation of their rights under color of any statute, ordinance, custom, etc., of any state or territory, thus preserving the corrective character of the legislation. Rev. St. §§ 1977, 1978, 1979, 5510. The civil rights bill here referred to is analogous in its character to what a law would have been under the original constitution, declaring that the validity of contracts should not be impaired, and that if any person bound by a contract should refuse to comply with it under color or pretense that it had been rendered void or invalid by a state law, he should be liable to

an action upon it in the courts of the United States, with the addition of a penalty for setting up such an unjust and unconstitutional defense.

In this connection it is proper to state that civil rights, such as are guarantied by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and to sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow-citizen; but unless protected in these wrongful acts by some shield of state law or state authority, he cannot destroy or injure the right, he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the state where the wrongful acts are committed. Hence, in all those cases where the constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the state by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for which it clothes the congress with power to provide a remedy. This abrogation and denial of rights, for which the states alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some state law or state authority for its excuse and perpetration.

Of course, these remarks do not apply to those cases in which congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the states, as in the regulation of commerce with foreign nations, among the several states, and with the Indian tribes, the coining of money, the establishment of post-offices and post-roads, the declaring of war, etc. In these cases congress has power to pass laws for regulating the subjects specified, in every detail, and the conduct and transactions of individuals in respect thereof. But where a subject is not submitted to the general legislative power of congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular state legislation or state action in reference to that subject, the power given is limited by its object, and any legislation by congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers.

If the principles of interpretation which we have laid down are correct, as we deem them to be,—and they are in accord with the principles laid down in the cases before referred to, as well as in the recent case of U. S. v. Harris (decided at the last term of this court) 1 Sup. Ct. 601,—it is clear that the law in question cannot be sustained by any grant of legislative power made to congress by the fourteenth amendment. That amendment prohibits the states from denying to any person the equal protection of the laws, and declares that congress shall have power to enforce, by appropriate legislation, the provisions of the amendment. The law in question, without any reference to adverse state legislation on the subject, declares that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation: it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces state legislation on the same subject, or only allows it permissive force. It ignores such legislation, and assumes that the matter is one that belongs to the domain of national regulation. Whether it would not have been a more effective protection of the rights of citizens to have clothed congress with plenary power over the whole subject, is not now the question. What we have to decide is, whether such plenary power has been conferred upon congress by the fourteenth amendment, and, in our judgment, it has not.

We have discussed the question presented by the law on the assumption that a right to enjoy equal accommodations and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of the citizen which no state can abridge or interfere with. Whether it is such a right or not is a different question, which, in the view we have taken of the validity of the law on the ground already stated, it is not necessary to examine.

We have also discussed the validity of the law in reference to cases arising in the states only; and not in reference to cases arising in the territories or the District of Columbia, which are subject to the plenary legislation of congress in every branch of municipal

regulation. Whether the law would be a valid one as applied to the territories and the district is not a question for consideration in the cases before us; they all being cases arising within the limits of states. And whether congress, in the exercise of its power to regulate commerce among the several states, might or might not pass a law regulating rights in public conveyances passing from one state to another, is also a question which is not now before us, as the sections in question are not conceived in any such view.

But the power of congress to adopt direct and primary, as distinguished from corrective, legislation on the subject in hand, is sought, in the second place, from the thirteenth amendment, which abolishes slavery. This amendment declares "that neither slavery, nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction;" and it gives congress power to enforce the amendment by appropriate legislation.

This amendment, as well as the fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.

It is true that slavery cannot exist without law any more than property in lands and goods can exist without law, and therefore the thirteenth amendment may be regarded as nullifying all state laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed that the power vested in congress to enforce the article by appropriate legislation, clothes congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States; and upon this assumption it is claimed that this is sufficient authority for declaring by law that all persons shall have equal accommodations and privileges in all inns, public conveyances, and places of public amusement; the argument being that the denial of such equal accommodations and privileges is in itself a subjection to a species of servitude within the meaning of the amendment. Conceding the major proposition to be true, that congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery, with all its badges and incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theater, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery? If it does not, then power to pass the law is not found in the thirteenth amendment.

In a very able and learned presentation of the cognate question as to the extent of the rights, privileges, and immunities of citizens which cannot rightfully be abridged by state laws under the fourteenth amendment, made in a former case, a long list of burdens and disabilities of a servile character, incident to feudal vassalage in France, and which were abolished by the decrees of the national assembly, was presented for the purpose of showing that all inequalities and observances exacted by one man from another, were servitudes or badges of slavery, which a great nation, in its effort to establish universal liberty, made haste to wipe out and destroy. But these were servitudes imposed by the old law, or by long custom which had the force of law, and exacted by one man from another without the latter's consent. Should any such servitudes be imposed by a state law, there can be no doubt that the law would be repugnant to the fourteenth, no less than to the thirteenth, amendment; nor any greater doubt that congress has adequate power to forbid any such servitude from being exacted.

But is there any similarity between such servitudes and a denial by the owner of an inn, a public conveyance, or a theater, of its accommodations and privileges to an individual, even though the denial be founded on the race or color of that individual? Where does any slavery or servitude, or badge of either, arise from such an act of denial? Whether it might not be a denial of a right which, if sanctioned by the state law, would be obnoxious to the prohibitions of the fourteenth amendment, is another question. But what has it to do with the question of slavery?

It may be that by the black code, (as it was called,) in the times when slavery prevailed, the proprietors of inns and public conveyances were forbidden to receive persons of the African race, because it might assist slaves to escape from the control of their masters. This was merely a means of preventing such escapes, and was no part of the servitude itself. A law of that kind could not have any such object now, however justly it might be deemed an invasion of the party's legal right as a citizen, and amenable to the prohibitions of the fourteenth amendment.

The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his

movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. Congress, as we have seen, by the civil rights bill of 1866, passed in view of the thirteenth amendment, before the fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property, as is enjoyed by white citizens. Whether this legislation was fully authorized by the thirteenth amendment alone, without the support which it afterwards received from the fourteenth amendment, after the adoption of which it was re-enacted with some additions, it is not necessary to inquire. It is referred to for the purpose of showing that at that time (in 1866) congress did not assume, under the authority given by the thirteenth amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.

We must not forget that the province and scope of the thirteenth and fourteenth amendments are different: the former simply abolished slavery: the latter prohibited the states from abridging the privileges or immunities of citizens of the United States, from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of congress under them are different. What congress has power to do under one, it may not have power to do under the other. Under the thirteenth amendment, it has only to do with slavery and its incidents. Under the fourteenth amendment, it has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States; or to deprive them of life, liberty, or property without due process of law, or to deny to any of them the equal protection of the laws. Under the thirteenth amendment the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not; under the fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against state regulations or proceedings.

The only question under the present head, therefore, is, whether the refusal to any persons of the accommodations of an inn, or a public conveyance, or a place of public amusement, by an individual, and without any sanction or support from any state law or regulation, does inflict upon such persons any manner of servitude, or form of slavery, as those terms are understood in this country? Many wrongs may be obnoxious to the prohibitions of the fourteenth amendment which are not, in any just sense, incidents or elements of slavery. Such, for example, would be the taking of private property without due process of law; or allowing persons who have committed certain crimes (horse-stealing, for example) to be seized and hung by the posse comitatus without regular trial; or denying to any person, or class of persons, the right to pursue any peaceful avocations allowed to others. What is called class legislation would belong to this category, and would be obnoxious to the prohibitions of the fourteenth amendment, but would not necessarily be so to the thirteenth, when not involving the idea of any subjection of one man to another. The thirteenth amendment has respect, not to distinctions of race, or class, or color, but to slavery. The fourteenth amendment extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.

Now, conceding, for the sake of the argument, that the admission to an inn, a public conveyance, or a place of public amusement, on equal terms with all other citizens, is the right of every man and all classes of men, is it any more than one of those rights which the states by the fourteenth amendment are forbidden to deny to any person? and is the constitution violated until the denial of the right has some state sanction or authority? Can the act of a mere individual, the owner of the inn, the public conveyance, or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the state, and presumably subject to redress by those laws until the contrary appears?

After giving to these questions all the considerations which their importance demands, we are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the state; or, if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legisla-

tion which congress has adopted, or may adopt, for counteracting the effect of state laws, or state action, prohibited by the fourteenth amendment. It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert of theater, or deal with in other matters of intercourse or business. Innkeepers and public carriers, by the laws of all the states, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the fourteenth amendment, congress has full power to afford a remedy under that amendment and in accordance with it.

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty, and property the same as white citizens; yet no one, at that time, thought that it was any invasion of their personal status as freemen because they were not admitted to all the privileges enjoyed by white citizens, or because they were subjected to discriminations in the enjoyment of accommodations in inns, public conveyances, and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the thirteenth amendment, (which merely abolishes slavery,) but by force of the fourteenth and fifteenth amendments.

On the whole, we are of opinion that no countenance of authority for the passage of the law in question can be found in either the thirteenth or fourteenth amendment of the constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several states is concerned.

This conclusion disposes of the cases now under consideration. In the cases of U. S. v. Ryan, and of Robinson v. Memphis & C. R. Co., the judgments must be affirmed. In the other cases, the answer to be given will be, that the first and second sections of the act of congress of March 1, 1875, entitled "An act to protect all citizens in their civil and legal rights," are unconstitutional and void, and that judgment should be rendered upon the several indictments in those cases accordingly. And it is so ordered.

Mr. Justice HARLAN dissents.

* * * * * * * * *

BOYD et al. v. UNITED STATES.[1]

(6 Sup. Ct. 524, 116 U. S. 616.)

Supreme Court of the United States. Feb. 1, 1886.

In error to the circuit court of the United States for the Southern district of New York.

E. B. Smith and S. G. Clarke, for plaintiffs in error. Sol. Gen. Goode, for defendant in error.

BRADLEY, J. This was an information filed by the district attorney of the United States in the district court for the Southern district of New York, in July, 1884, in a cause of seizure and forfeiture of property, against 35 cases of plate glass, seized by the collector as forfeited to the United States, under the twelfth section of the "Act to amend the customs revenue laws," etc., passed June 22, 1874, (18 St. 186.) It is declared by that section that any owner, importer, consignee, etc., who shall, with intent to defraud the revenue, make, or attempt to make, any entry of imported merchandise, by means of any fraudulent or false invoice, affidavit, letter, or paper, or by means of any false statement, written or verbal, or who shall be guilty of any willful act or omission, by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, shall for each offense be fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited.

The charge was that the goods in question were imported into the United States to the port of New York, subject to the payment of duties; and that the owners or agents of said merchandise, or other person unknown, committed the alleged fraud, which was described in the words of the statute. The plaintiffs in error entered a claim for the goods, and pleaded that they did not become forfeited in manner and form as alleged. On the trial of the cause it became important to show the quantity and value of the glass contained in 29 cases previously imported. To do this the district attorney offered in evidence an order made by the district judge under the fifth section of the same act of June 22, 1874, directing notice under seal of the court to be given to the claimants, requiring them to produce the invoice of the 29 cases. The claimants, in obedience to the notice, but objecting to its validity and to the constitutionality of the law, produced the invoice; and when it was offered in evidence by the district attorney they objected to its reception on the ground that, in a suit for forfeiture, no evidence can be compelled from the claimants themselves, and also that the statute, so far as it compels production of evidence to be used against the claimants, is unconstitutional and void. The evidence being received, and the trial closed, the jury found a verdict for the United States, condemning the 35 cases of glass which were seized, and judgment of forfeiture was given. This judgment was affirmed by the circuit court, and the decision of that court is now here for review.

As the question raised upon the order for the production by the claimants of the invoice of the 29 cases of glass, and the proceedings had thereon, is not only an important one in the determination of the present case, but is a very grave question of constitutional law, involving the personal security, and privileges and immunities of the citizen, we will set forth the order at large. After the title of the court and term, it reads as follows, to-wit:

"The United States of America against E. A. B., 1-35, Thirty-Five Cases of Plate Glass.

"Whereas, the attorney of the United States for the Southern district of New York has filed in this court a written motion in the above-entitled action, showing that said action is a suit or proceeding other than criminal, arising under the customs revenue laws of the United States, and not for penalties, now pending undetermined in this court, and that in his belief a certain invoice or paper belonging to and under the control of the claimants herein will tend to prove certain allegations set forth in said written motion, hereto annexed, made by him on behalf of the United States in said action, to-wit, the invoice from the Union Plate Glass Company, or its agents, covering the twenty-nine cases of plate glass marked G. H. B., imported from Liverpool, England, into the port of New York, in the vessel Baltic, and entered by E. A. Boyd & Sons at the office of the collector of customs of the port and collection district aforesaid, on April 7, 1884, on entry No. 47,108:

"Now, therefore, by virtue of the power in the said court vested by section 5 of the act of June 22, 1874, entitled 'An act to amend the customs revenue laws and to repeal moieties,' it is ordered that a notice under the seal of this court, and signed by the clerk thereof, be issued to the claimants, requiring them to produce the invoice or paper aforesaid before this court in the court-rooms thereof in the United States post-office and court-house building in the city of New York on October 16, 1884, at eleven o'clock a. m., and thereafter at such other times as the court shall appoint, and that said United States attorney and his assistants and such persons as he shall designate shall be allowed before the court, and under its direction and in the presence of the attorneys for the

[1] Concurring opinion of Mr. Justice Miller omitted.

claimants, if they shall attend, to make examination of said invoice or paper and to take copies thereof; but the claimants or their agents or attorneys shall have, subject to the order of the court, the custody of such invoice or paper, except pending such examination."

The fifth section of the act of June 22, 1874, under which this order was made, is in the following words, to-wit:

"In all suits and proceedings other than criminal, arising under any of the revenue laws of the United States, the attorney representing the government, whenever in his belief any business book, invoice, or paper belonging to, or under the control of, the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced the said attorney shall be permitted, under the direction of the court, to make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice, or paper as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid." 18 St. 187.

This section was passed in lieu of the second section of the act of March 2, 1867, entitled "An act to regulate the disposition of the proceeds of fines, penalties, and forfeitures incurred under the laws relating to the customs, and for other purposes," (14 St. 547,) which section of said last-mentioned statute authorized the district judge, on complaint and affidavit that any fraud on the revenue had been committed by any person interested or engaged in the importation of merchandise, to issue his warrant to the marshal to enter any premises where any invoices, books, or papers were deposited relating to such merchandise, and take possession of such books and papers and produce them before said judge, to be subject to his order, and allowed to be examined by the collector, and to be retained as long as the judge should deem necessary. This law being in force at the time of the revision, was incorporated into sections 3091–3093, of the Revised Statutes.

The section last recited was passed in lieu of the seventh section of the act of March 3, 1863, entitled "An act to prevent and punish frauds upon the revenue," etc. 12 St. 737. The seventh section of this act was in substance the same as the second section of the act of 1867, except that the warrant was to be directed to the collector instead of the marshal. It was the first legislation of the kind that ever appeared on the statute book of the United States, and, as seen from its date, was adopted at a period of great national excitement, when the powers of the government were subjected to a severe strain to protect the national existence. The clauses of the constitution, to which it is contended that these laws are repugnant, are the fourth and fifth amendments. The fourth declares: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The fifth article, among other things, declares that no person "shall be compelled in any criminal case to be a witness against himself." But, in regard to the fourth amendment, it is contended that, whatever might have been alleged against the constitutionality of the acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection, because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. That is so; but it declares that if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production, for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching among his papers, are wanting, and to this extent the proceeding under the act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man's private papers

to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment to the constitution, in all cases in which a search and seizure would be, because it is a material ingredient, and effects the sole object and purpose of search and seizure.

The principal question, however, remains to be considered. Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an "unreasonable search and seizure" within the meaning of the fourth amendment of the constitution? or is it a legitimate proceeding? It is contended by the counsel for the government, that it is a legitimate proceeding, sanctioned by long usage, and the authority of judicial decision. No doubt long usage, acquiesced in by the courts, goes a long way to prove that there is some plausible ground or reason for it in the law, or in the historical facts which have imposed a particular construction of the law favorable to such usage. It is a maxim that, consuetudo est optimus interpres legum; and another maxim that, contemporanea, expositio est optima et fortissima in lege. But we do not find any long usage or any contemporary construction of the constitution, which would justify any of the acts of congress now under consideration. As before stated, the act of 1863 was the first act in this country, and we might say, either in this country or in England, so far as we have been able to ascertain, which authorized the search and seizure of a man's private papers, or the compulsory production of them, for the purpose of using them in evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property. Even the act under which the obnoxious writs of assistance were issued [2] did not go as far as this, but only authorized the examination of ships and vessels, and persons found therein, for the purpose of finding goods prohibited to be imported or exported, or on which the duties were not paid, and to enter into and search any suspected vaults, cellars, or warehouses for such goods. The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ toto cœlo. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; [3] and the like seizures have been authorized by our own revenue acts from the commencement of the government.

The first statute passed by congress to regulate the collection of duties, the act of July 31, 1789, (1 St. 43,) contains provisions to this effect. As this act was passed by the same congress which proposed for adoption the original amendments to the constitution, it is clear that the members of that body did not regard searches and seizures of this kind as "unreasonable," and they are not embraced within the prohibition of the amendment. So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, etc., are not within this category. Com. v. Dana, 2 Metc. 329. Many other things of this character might be enumerated. The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the fourth or fifth amendment, or any other clause of the constitution; nor is the examination of a defendant under oath after an ineffectual execution, for the purpose of discovering secreted property or credits, to be applied to the payment of a judgment against him, obnoxious to those amendments. But, when examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from whom they were stolen is entitled to their possession, and in the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment; and in the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt; and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civ-

[2] 13 & 14 Car. II. c. 11, § 5.

[3] 12 Car. II. c. 19; 13 & 14 Car. II. c. 11; 6 & 7 W. & M. c. 1; 6 Geo. I. c. 21; 26 Geo. III. c. 59; 29 Geo. III. c. 68, § 153, etc.; and see the article "Excise," etc., in Burn, Just. and Williams, Just., passim, and 2 Evans, St. 221, sub-pages 176, 190, 225, 361, 431, 447.

il to effect the ends of justice, and is no more than what the court of chancery would direct on a bill for discovery. Whereas, by the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property.

In order to ascertain the nature of the proceedings intended by the fourth amendment to the constitution under the terms "unreasonable searches and seizures," it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;" since they placed "the liberty of every man in the hands of every petty officer." [4] This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. "Then and there," said John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." These things, and the events which took place in England immediately following the argument about writs of assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government. In the period from 1762, when the North Briton was started by John Wilkes, to April, 1766, when the house of commons passed resolutions condemnatory of general warrants, whether for the seizure of persons or papers, occurred the bitter controversy between the English government and Wilkes, in which the latter appeared as the champion of popular rights, and was, indeed, the pioneer in the contest which resulted in the abolition of some grievous abuses which had gradually crept into the administration of public affairs. Prominent and principal among these was the practice of issuing general warrants by the secretary of state, for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel. Certain numbers of the North Briton, particularly No. 45, had been very bold in denunciation of the government, and were esteemed heinously libelous. By authority of the secretary's warrant Wilkes' house was searched, and his papers were indiscriminately seized. For this outrage he sued the perpetrators and obtained a verdict of £1,000 against Wood, one of the party who made the search, and £4,000 against Lord Halifax, the secretary of state, who issued the warrant. The case, however, which will always be celebrated as being the occasion of Lord Camden's memorable discussion of the subject, was that of Entick v. Carrington and Three Other King's Messengers, reported at length in 19 How. St. Tr. 1029. The action was trespass for entering the plaintiff's dwelling-house in November, 1762, and breaking open his desks, boxes, etc., and searching and examining his papers. The jury rendered a special verdict, and the case was twice solemnly argued at the bar. Lord Camden pronounced the judgment of the court in Michaelmas term, 1765, and the law, as expounded by him, has been regarded as settled from that time to this, and his great judgment on that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British constitution, and is quoted as such by the English authorities on that subject down to the present time.[5]

As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the fourth amendment to the constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures. We think, therefore, it is pertinent to the present subject of discussion to quote somewhat largely from this celebrated judgment. After describing the power claimed by the secretary of state for issuing general search-warrants, and the manner in which they were executed, Lord Camden says:

"Such is the power, and therefore one would naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant. If it is law, it will be found in our books; if it is not to be found there it is not law.

"The great end for which men entered into

[4] Cooley, Const. Lim. 301–303. A very full and interesting account of this discussion will be found in the works of John Adams, vol. 2, Appendix A, pp. 523–525; vol. 10, pp. 183, 233, 244, 256, etc., and in Quincy's Reports, pp. 469–482; and see Paxton's Case, Id. 51–57, which was argued in November of the same year, (1761.) An elaborate history of the writs of assistance is given in the appendix to Quincy's Reports, above referred to, written by Horace Gray, Jr., Esq., now a member of this court.

[5] See 3 May, Const. Hist. England, c. 11; Broom, Const. Law, 558; Cox, Inst. Eng. Gov. 437.

society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, etc., are all of this description, wherein every man by common consent gives up that right for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing, which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show, by way of justification, that some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment. According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass.

"Papers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.

"But though it cannot be maintained by any direct law, yet it bears a resemblance, as was urged, to the known case of search and seizure for stolen goods. I answer that the difference is apparent. In the one, I am permitted to seize my own goods, which are placed in the hands of a public officer till the felon's conviction shall entitle me to restitution. In the other, the party's own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is declared by acquittal.

"The case of searching for stolen goods crept into the law by imperceptible practice. No less a person than my Lord Coke denied its legality, (4 Inst. 176;) and therefore, if the two cases resembled each other more than they do, we have no right, without an act of parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity. Observe, too, the caution with which the law proceeds in this singular case. There must be a full charge upon oath of a theft committed. The owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant, to show them to the officer, who must see that they answer the description. * * *

"If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief would likewise in this case protect the subject by adding proper checks; would require proofs beforehand; would call up the servant to stand by and overlook; would require him to take an exact inventory, and deliver a copy,—my answer is that all these precautions would have been long since established by law if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing."

Then, after showing that these general warrants for search and seizure of papers originated with the Star Chamber, and never had any advocates in Westminster Hall except Chief Justice Scroggs and his associates, Lord Camden proceeds to add:

"Lastly it is urged as an argument of utility that such a search is a means of detecting offenders by discovering evidence I wish some cases had been shown where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence there is no way to get it back but by action. In the criminal law such a proceeding was never heard of; and yet there are some crimes, such, for instance, as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libeling. But our law has provided no paper-search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself, because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty."

After a few further observations, his lordship concludes thus:

"I have now taken notice of everything that has been urged upon the present point; and upon the whole we are all of opinion that the warrant to seize and carry away the party's papers in the case of a seditious libel is illegal and void."[6]

The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other. Can we doubt that when the fourth and fifth amendments to the constitution of the United States were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and "unreasonable" character of such seizures? Could the men who proposed those amendments, in the light of Lord Camden's opinion, have put their hands to a law like those of March 3, 1863, and March 2, 1867, before recited? If they could not, would they have approved the fifth section of the act of June 22, 1874, which was adopted as a substitute for the previous laws? It seems to us that the question cannot admit of a doubt. They never would have approved of them. The struggles against arbitrary power in which they had been engaged for more than 20 years would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred.

The views of the first congress on the question of compelling a man to produce evidence against himself may be inferred from a remarkable section of the judiciary act of 1789. The fifteenth section of that act introduced a great improvement in the law of procedure. The substance of it is found in section 724 of the Revised Statutes, and the section as originally enacted is as follows, to-wit:

"All the said courts of the United States shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order to produce books or writings it shall be lawful for the courts respectively, on motion, to give the like judgment for the defendant as in cases of nonsuit; and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion as aforesaid, to give judgment against him or her by default."[7]

The restriction of this proceeding to "cases and under circumstances where they [the parties] might be compelled to produce the same [books or writings] by the ordinary rules of proceeding in chancery," shows the wisdom of the congress of 1789. The court of chancery had for generations been weighing and balancing the rules to be observed in granting discovery on bills filed for that purpose, in the endeavor to fix upon such as would best secure the ends of justice. To go beyond the point to which that court had gone may well have been thought hazardous. Now it is elementary knowledge that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property.[8] And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.

It is proper to observe that when the objectionable features of the acts of 1863 and 1867 were brought to the attention of congress it passed an act to obviate them. By the act of February 25, 1868, (15 St. 37,) entitled "An act for the protection in certain cases of persons making disclosures as parties, or testifying as witnesses," the substance of which is incorporated in section 860

[6] See further as to searches and seizures, Story, Const. §§ 1901, 1902, and notes; Cooley, Const. Lim. 299; Sedgw. St. & Const. Law, (2d Ed.) 498; Whart. Com. Amer. Law, § 560; Robinson v. Richardson, 13 Gray, 454.

[7] Sixty-two years later a similar act was passed in England, viz., the act of 14 & 15 Vict. c. 99, § 6. See Poll. Prod. Doc. 5.

[8] See Poll. Prod. Doc. 27; 77 Law Lib.

of the Revised Statutes, it was enacted "that no answer or other pleading of any party, and no discovery, or evidence obtained by means of any judicial proceeding from any party or witness in this or any foreign country, shall be given in evidence, or in any manner used against such party or witness, or his property or estate, in any court of the United States, or in any proceeding by or before any officer of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture by reason of any act or omission of such party or witness." This act abrogated and repealed the most objectionable part of the act of 1867, (which was then in force,) and deprived the government officers of the convenient method afforded by it for getting evidence in suits of forfeiture; and this is probably the reason why the fifth section of the act of 1874 was afterwards passed. No doubt it was supposed that in this new form, couched as it was in almost the language of the fifteenth section of the old judiciary act, except leaving out the restriction to cases in which the court of chancery would decree a discovery, it would be free from constitutional objection. But we think it has been made to appear that this result has not been attained; and that the law, though very speciously worded, is still obnoxious to the prohibition of the fourth amendment of the constitution, as well as of the fifth.

It has been thought by some respectable members of the profession that the two acts, that of 1868 and that of 1874, as being in pari materia, might be construed together so as to restrict the operation of the latter to cases other than those of forfeiture, and that such a construction of the two acts would obviate the necessity of declaring the act of 1874 unconstitutional. But as the act of 1874 was intended as a revisory act on the subject of revenue frauds and prosecutions therefor, and as it expressly repeals the second section of the act of 1867, but does not repeal the act of 1868, and expressly excepts criminal suits and proceedings, and does not except suits for penalties and forfeitures, it would hardly be admissible to consider the act of 1868 as having any influence over the construction of the act of 1874. For the purposes of this discussion we must regard the fifth section of the latter act as independent of the act of 1868. Reverting, then, to the peculiar phraseology of this act, and to the information in the present case, which is founded on it, we have to deal with an act which expressly excludes criminal proceedings from its operation, (though embracing civil suits for penalties and forfeitures,) and with an information not technically a criminal proceeding, and neither, therefore, within the literal terms of the fifth amendment to the constitution any more than it is within the literal terms of the fourth. Does this relieve the proceedings or the law from being obnoxious to the prohibitions of either? We think not; we think they are within the spirit of both.

We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the "unreasonable searches and seizures" condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the fifth amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the fourth amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms. We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. In this very case the ground of forfeiture, as declared in the twelfth section of the act of 1874, on which the information is based, consists of certain acts of fraud committed against the public revenue in relation to imported merchandise, which are made criminal by the statute; and it is declared, that the offender shall be fined not exceeding $5,000, nor less than $50, or be imprisoned not exceeding two years, or both; and in addition to such fine such merchandise shall be forfeited. These are the penalties affixed to the criminal acts, the forfeiture sought by this suit being one of them. If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants,—that is, civil in form, —can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one. As showing the close relation between the civil and criminal proceedings on the same statute in such cases we may refer to the recent case of Coffey v. U. S., 116 U. S. 427, 6 Sup. Ct. 432, in which we decided that an acquittal on a criminal information was a good plea in bar to a civil information for the forfeiture of goods, arising upon the same acts. As, therefore, suits for penalties and forfeitures, incurred by the com-

mission of offenses against the law, are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the constitution, and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the fifth amendment to the constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the fourth amendment. Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law.

There have been several decisions in the circuit and district courts sustaining the constitutionality of the law under consideration, as well as the prior laws of 1863 and 1867. The principal of these are Stockwell v. U. S., 3 Cliff. 284, Fed. Cas. No. 13,466; In re Platt, 7 Ben. 261, Fed. Cas. No. 11,212; U. S. v. Hughes, 12 Blatchf. 553, Fed. Cas. No. 15,417; U. S. v. Mason, 6 Biss. 350, Fed. Cas. No. 15,735; Same v. Three Tons of Coal, 6 Biss. 379, Fed. Cas. No. 16,515; Same v. Distillery No. 28, 6 Biss. 483, Fed. Cas. No. 14,966. The first and leading case was that of Stockwell v. U. S., decided by Mr. Justice Clifford and Judge Shepley, the law under discussion being that of 1867. Justice Clifford delivered the opinion, and relied principally upon the collection statutes, which authorized the seizure of goods liable to duty, as being a contemporaneous exposition of the amendments, and as furnishing precedents of analogous laws to that complained of. As we have already considered the bearing of these laws on the subject of discussion, it is unnecessary to say anything more in relation to them. The learned justice seemed to think that the power to institute such searches and seizures as the act of 1867 authorized, was necessary to the efficient collection of the revenue, and that no greater objection can be taken to a warrant to search for books, invoices, and other papers appertaining to an illegal importation than to one authorizing a search for the imported goods; and he concluded that, guarded as the new provision is, it is scarcely possible that the citizen can have any just ground of complaint. It seems to us that these considerations fail to meet the most serious objections to the validity of the law. The other cases followed that of Stockwell v. U. S. as a precedent, with more or less independent discussion of the subject. The Case of Platt and Boyd, decided in the district court for the Southern district of New York, was also under the act of 1867, and the opinion in that case is quite an elaborate one; but, of course, the previous decision of the circuit court in the Stockwell Case had a governing influence on the district court. The other cases referred to were under the fifth section of the act of 1874. The case of U. S. v. Hughes came up, first, before Judge Blatchford in the district court in 1875. 8 Ben. 29, Fed. Cas. No. 15,416. It was an action of debt to recover a penalty under the customs act, and the judge held that the fifth section of the act of 1874, in its application to suits for penalties incurred before the passage of the act, was an ex post facto law, and therefore, as to them, was unconstitutional and void; but he granted an order pro forma to produce the books and papers required, in order that the objection might come up on the offer to give them in evidence. They were produced in obedience to the order, and offered in evidence by the district attorney, but were not admitted. The district attorney then served upon one of the defendants a subpœna duces tecum, requiring him to produce the books and papers; and this being declined, he moved for an order to compel him to produce them; but the court refused to make such order. The books and papers referred to had been seized under the act of 1867, but were returned to the defendants under a stipulation to produce them on the trial. The defendants relied, not only on the unconstitutionality of the laws, but on the act of 1868, before referred to, which prohibited evidence obtained from a party by a judicial proceeding from being used against him in any prosecution for a crime, penalty, or forfeiture. Judgment being rendered for the defendant, the case was carried to the circuit court by writ of error, and, in that court, Mr. Justice Hunt held that the act of 1868 referred only to personal testimony or discovery obtained from a party or witness, and not

to books or papers wrested from him; and, as to the constitutionality of the law, he merely referred to the Case of Stockwell, and the judgment of the district court was reversed. In view of what has been already said, we think it unnecessary to make any special observations on this decision. In U. S. v. Mason, Judge Blodgett took the distinction that, in proceedings in rem for a forfeiture, the parties are not required by a proceeding under the act of 1874 to testify or furnish evidence against themselves, because the suit is not against them, but against the property. But where the owner of the property has been admitted as a claimant, we cannot see the force of this distinction; nor can we assent to the proposition that the proceeding is not, in effect, a proceeding against the owner of the property, as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited, and to require such an owner to produce his private books and papers in order to prove his breach of the laws, and thus to establish the forfeiture of his property, is surely compelling him to furnish evidence against himself: In the words of a great judge, "Goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are." [9]

The only remaining case decided in the United States courts, to which we shall advert, is that of U. S. v. Distillery No. 28. In that case Judge Gresham adds to the view of Judge Blodgett, in U. S. v. Mason, the further suggestion, that as in a proceeding in rem the owner is not a party, he might be compelled by a subpœna duces tecum to produce his books and papers like any other witness; and that the warrant or notice for search and seizure, under the act of 1874, does nothing more. But we cannot say that we are any better satisfied with this supposed solution of the difficulty. The assumption that the owner may be cited as a witness in a proceeding to forfeit his property seems to us gratuitous. It begs the question at issue. A witness, as well as a party, is protected by the law from being compelled to give evidence that tends to criminate him, or to subject his property to forfeiture. Queen v. Newel, Parker, 269; 1 Greenl. Ev. §§ 451–453. But, as before said, although the owner of goods, sought to be forfeited by a proceeding in rem, is not the nominal party, he is, nevertheless, the substantial party to the suit; he certainly is so, after making claim and defense; and, in a case like the present, he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offense.

We find nothing in the decisions to change our views in relation to the principal question at issue. We think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection by the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings. We are of opinion, therefore, that the judgment of the circuit court should be reversed, and the cause remanded, with directions to award a new trial; and it is so ordered.

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[9] Vaughan, C. J., in Sheppard v. Gosnold, Vaughan, 159, 172; approved by Parker, C. B., in Mitchell v. Torup, Parker, 227, 236.

ELK v. WILKINS.[1]

(5 Sup. Ct. 41, 112 U. S. 94.)

Supreme Court of the United States. Nov. 3, 1884.

In error to the circuit court of the United States for the district of Nebraska.

A. J. Poppleton and J. L. Webster, for plaintiff in error. G. M. Lamberton, for defendant in error.

GRAY, J. This is an action brought by an Indian, in the circuit court of the United States for the district of Nebraska, against the registrar of one of the wards of the city of Omaha, for refusing to register him as a qualified voter therein. The petition was as follows: "John Elk, plaintiff, complains of Charles Wilkins, defendant, and avers that the matter in dispute herein exceeds the sum of five hundred dollars, to-wit, the sum of six thousand dollars, and that the matter in dispute herein arises under the constitution and laws of the United States; and, for cause of action against the defendant, avers that he, the plaintiff, is an Indian, and was born within the United States; that more than one year prior to the grievances hereinafter complained of he had severed his tribal relation to the Indian tribes, and had fully and completely surrendered himself to the jurisdiction of the United States, and still so continues subject to the jurisdiction of the United States; and avers that, under and by virtue of the fourteenth amendment to the constitution of the United States, he is a citizen of the United States, and entitled to the right and privilege of citizens of the United States. That on the sixth day of April, 1880, there was held in the city of Omaha (a city of the first class, incorporated under the general laws of the state of Nebraska, providing for the incorporation of cities of the first class) a general election for the election of members of the city council and other officers for said city. That the defendant, Charles Wilkins, held the office of and acted as registrar in the Fifth ward of said city, and that as such registrar it was the duty of such defendant to register the names of all persons entitled to exercise the elective franchise in said ward of said city at said general election. That this plaintiff was a citizen of and had been a bona fide resident of the state of Nebraska for more than six months prior to said sixth day of April, 1880, and had been a bona fide resident of Douglas county, wherein the city of Omaha is situate, for more than forty days, and in the Fifth ward of said city more than ten days prior to the said sixth day of April, and was such citizen and resident at the time of said election, and at the time of his attempted registration, as hereinafter set forth, and was in every way qualified, under the laws of the state of Nebraska and of the city of Omaha, to be registered as a voter, and to cast a vote at said election, and complied with the laws of the city and state in that behalf. That on or about the fifth day of April, 1880, and prior to said election, this plaintiff presented himself to said Charles Wilkins, as such registrar, at his office, for the purpose of having his name registered as a qualified voter, as provided by law, and complied with all the provisions of the statutes in that regard, and claimed that, under the fourteenth and fifteenth amendments to the constitution of the United States, he was a citizen of the United States, and was entitled to exercise the elective franchise, regardless of his race and color; and that said Wilkins, designedly, corruptly, willfully, and maliciously, did then and there refuse to register this plaintiff, for the sole reason that the plaintiff was an Indian, and therefore not a citizen of the United States, and not, therefore, entitled to vote, and on account of his race and color, and with the willful, malicious, corrupt, and unlawful design to deprive this plaintiff of his right to vote at said election, and of his rights, and all other Indians of their rights, under said fourteenth and fifteenth amendments to the constitution of the United States, on account of his and their race and color. That on the sixth day of April this plaintiff presented himself at the place of voting in said ward, and presented a ballot, and requested the right to vote, where said Wilkins, who was then acting as one of the judges of said election in said ward, in further carrying out his willful and malicious designs as aforesaid, declared to the plaintiff and to the other election officers that the plaintiff was an Indian, and not a citizen, and not entitled to vote, and said judges and clerks of election refused to receive the vote of the plaintiff, for that he was not registered as required by law. Plaintiff avers the fact to be that by reason of said willful, unlawful, corrupt, and malicious refusal of said defendant to register this plaintiff, as provided by law, he was deprived of his right to vote at said election, to his damage in the sum of $6,000. Wherefore, plaintiff prays judgment against defendant for $6,000, his damages, with costs of suit."

The defendant filed a general demurrer for the following causes: (1) That the petition did not state facts sufficient to constitute a cause of action; (2) that the court had no jurisdiction of the person of the defendant; (3) that the court had no jurisdiction of the subject of the action. The demurrer was argued before Judge McCrary and Judge Dundy, and sustained; and, the plaintiff electing to stand by his petition, judgment was rendered for the defendant, dismissing the petition, with costs. The plaintiff sued out this writ of error.

By the constitution of the state of Nebras-

[1] Dissenting opinion of Mr. Justice Harlan omitted.

ka, art. 7, § 1, "every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the state six months, and in the county, precinct, or ward for the term provided by law, shall be an elector: First, citizens of the United States; second, persons of foreign birth who shall have declared their intention to become citizens, conformably to the laws of the United States on the subject of naturalization, at least thirty days prior to an election." By the statutes of Nebraska, every male person of the age of 21 years or upward, belonging to either of the two classes so defined in the constitution of the state, who shall have resided in the state 6 months, in the county 40 days, and in the precinct, township, or ward 10 days, shall be an elector; the qualifications of electors in the several wards of cities of the first class (of which Omaha is one) shall be the same as in precincts; it is the duty of the registrar to enter in the register of qualified voters the name of every person who applies to him to be registered, and satisfies him that he is qualified to vote under the provisions of the election laws of the state; and at all municipal, as well as county or state elections, the judges of election are required to check the name, and receive and deposit the ballot, of any person whose name appears on the register. Comp. St. Neb. 1881, c. 26, § 3; c. 13, § 14; c. 76, §§ 6, 13, 19.

The plaintiff, in support of his action, relies on the first clause of the first section of the fourteenth article of amendment of the constitution of the United States, by which "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside;" and on the fifteen article of amendment, which provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." This being a suit at common law in which the matter in dispute exceeds $500, arising under the constitution of the United States, the circuit court had jurisdiction of it under the act of March 3, 1875, c. 137, § 1, even if the parties were citizens of the same state. 18 Stat. 470; Ames v. Kansas, 111 U. S. 449, 4 Sup. Ct. 437. The judgment of that court, dismissing the action with costs, must have proceeded upon the merits, for if the dismissal had been for want of jurisdiction, no costs could have been awarded. Mayor v. Cooper, 6 Wall. 247; Mansfield, C. & L. M. Ry. v. Swan, 111 U. S. 379, 4 Sup. Ct. 510. And the only point argued by the defendant in this court is whether the petition sets forth facts enough to constitute a cause of action. The decision of this point, as both parties assume in their briefs, depends upon the question whether the legal conclusion, that under and by virtue of the fourteenth amendment of the constitution the plaintiff is a citizen of the United States, is supported by the facts alleged in the petition and admitted by the demurrer, to-wit: The plaintiff is an Indian, and was born in the United States, and has severed his tribal relation to the Indian tribes, and fully and completely surrendered himself to the jurisdiction of the United States, and still continues to be subject to the jurisdiction of the United States, and is a bona fide resident of the state of Nebraska and city of Omaha. The petition, while it does not show of what Indian tribe the plaintiff was a member, yet, by the allegations that he "is an Indian, and was born within the United States," and that "he had severed his tribal relations to the Indian tribes," clearly implies that he was born a member of one of the Indian tribes within the limits of the United States which still exists and is recognized as a tribe by the government of the United States. Though the plaintiff alleges that he "had fully and completely surrendered himself to the jurisdiction of the United States," he does not allege that the United States accepted his surrender, or that he has ever been naturalized, or taxed, or in any way recognized or treated as a citizen by the state or by the United States. Nor is it contended by his counsel that there is any statute or treaty that makes him a citizen.

The question then is, whether an Indian, born a member of one of the Indian tribes within the United States, is, merely by reason of his birth within the United States, and of his afterwards voluntarily separating himself from his tribe and taking up his residence among white citizens, a citizen of the United States, within the meaning of the first section of the fourteenth amendment of the constitution. Under the constitution of the United States, as originally established, "Indians not taxed" were excluded from the persons according to whose numbers representatives and direct taxes were apportioned among the several states; and congress had and exercised the power to regulate commerce with the Indian tribes, and the members thereof, whether within or without the boundaries of one of the states of the Union. The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the president and senate, or through acts of congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be

taxed by any state. General acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them. Const. art. 1, §§ 2, 8; art. 2, § 2; Cherokee Nation v. Georgia, 5 Pet. 1; Worcester v. Georgia, 6 Pet. 515; U. S. v. Rogers, 4 How. 567; U. S. v. Holliday, 3 Wall. 407; Case of the Kansas Indians, 5 Wall. 737; Case of the New York Indians, Id. 761; Case of the Cherokee Tobacco, 11 Wall. 616; U. S. v. Whisky, 93 U. S. 188; Pennock v. Commissioners, 103 U. S. 44; Crow Dog's Case, 109 U. S. 556, 3 Sup. Ct. 396; Goodell v. Jackson, 20 Johns. 693; Hastings v. Farmer, 4 N. Y. 293.

The alien and dependent condition of the members of the Indian tribes could not be put off at their own will without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization and satisfactory proof of fitness for civilized life; for examples of which see treaties in 1817 and 1835 with the Cherokees, and in 1820, 1825, and 1830 with the Choctaws. (7 Stat. 159, 211, 236, 335, 483, 488; Wilson v. Wall, 6 Wall. 83; Opinion of Attorney General Taney, 2 Op. Atty. Gen. 462;) in 1855 with the Wyandotts, (10 Stat. 1159; Karrahoo v. Adams, 1 Dill. 344, 346, Fed. Cas. No. 7,614; Gray v. Coffman, 3 Dill. 393, Fed. Cas. No. 5,714; Hicks v. Butrick, 3 Dill. 413, Fed. Cas. No. 6,458;) in 1861 and in March, 1866, with the Pottawatomies, (12 Stat. 1192; 14 Stat. 763;) in 1862 with the Ottawas, (12 Stat. 1237;) and the Kickapoos, (13 Stat. 624;) and acts of congress of March 3, 1839, c. 83, § 7, concerning the Brothertown Indians; and of March 3, 1843, c. 101, § 7, August 6, 1846, c. 88, and March 3, 1865, c. 127, § 4, concerning the Stockbridge Indians, (5 Stat. 351, 647; 9 Stat. 55; 13 Stat. 562.) See, also, treaties with the Stockbridge Indians in 1848 and 1856, (9 Stat. 955; 11 Stat. 667; 7 Op. Attys. Gen. 746.)

Chief Justice Taney, in the passage cited for the plaintiff from his opinion in Scott v. Sandford, 19 How. 393, 404, did not affirm or imply that either the Indian tribes, or individual members of those tribes, had the right, beyond other foreigners, to become citizens of their own will, without being naturalized by the United States. His words were: "They" (the Indian tribes) "may without doubt, like the subjects of any foreign government, be naturalized by the authority of congress, and become citizens of a state, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people." But an emigrant from any foreign state cannot become a citizen of the United States without a formal renunciation of his old allegiance, and an acceptance by the United States of that renunciation through such form of naturalization as may be required by law.

The distinction between citizenship by birth and citizenship by naturalization is clearly marked in the provisions of the constitution, by which "no person, except a natural-born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president;" and "the congress shall have power to establish an uniform rule of naturalization." Const. art. 2, § 1; art. 1, § 8. By the thirteenth amendment of the constitution slavery was prohibited. The main object of the opening sentence of the fourteenth amendment was to settle the question, upon which there had been a difference of opinion throughout the country and in this court, as to the citizenship of free negroes (Scott v. Sandford, 19 How. 393;) and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States and of the state in which they reside. Slaughter-House Cases, 16 Wall. 36, 73; Strauder v. West Virginia, 100 U. S. 303, 306.

This section contemplates two sources of citizenship, and two sources only: birth and naturalization. The persons declared to be citizens are "all persons born or naturalized in the United States, and subject to the jurisdiction thereof." The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts; or collectively, as by the force of a treaty by which foreign territory is acquired. Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes, (an alien though dependent power,) although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign

nations. This view is confirmed by the second section of the fourteenth amendment, which provides that "representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed." Slavery having been abolished, and the persons formerly held as slaves made citizens, this clause fixing the apportionment of representatives has abrogated so much of the corresponding clause of the original constitution as counted only three-fifths of such persons. But Indians not taxed are still excluded from the count, for the reason that they are not citizens. Their absolute exclusion from the basis of representation, in which all other persons are now included, is wholly inconsistent with their being considered citizens. So the further provision of the second section for a proportionate reduction of the basis of the representation of any state in which the right to vote for presidential electors, representatives in congress, or executive or judicial officers or members of the legislature of a state, is denied, except for participation in rebellion or other crime, to "any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States," cannot apply to a denial of the elective franchise to Indians not taxed, who form no part of the people entitled to representation.

It is also worthy of remark that the language used, about the same time, by the very congress which framed the fourteenth amendment, in the first section of the civil rights act of April 9, 1866, declaring who shall be citizens of the United States, is "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed." 14 Stat. 27; Rev. St. § 1992. Such Indians, then, not being citizens by birth, can only become citizens in the second way mentioned in the fourteenth amendment, by being "naturalized in the United States," by or under some treaty or statute. The action of the political departments of the government, not only after the proposal of the amendment by congress to the states in June, 1866, but since the proclamation in July, 1868, of its ratification by the requisite number of states, accords with this construction. While the amendment was pending before the legislatures of the several states, treaties containing provisions for the naturalization of members of Indian tribes as citizens of the United States were made on July 4, 1866, with the Delawares, in 1867 with various tribes in Kansas, and with the Pottawatomies, and in April, 1868, with the Sioux. 14 Stat. 794, 796; 15 Stat. 513, 532, 533, 637.

The treaty of 1867 with the Kansas Indians strikingly illustrates the principle that no one can become a citizen of a nation without its consent, and directly contradicts the supposition that a member of an Indian tribe can at will be alternately a citizen of the United States and a member of the tribe. That treaty not only provided for the naturalization of members of the Ottawa, Miami, Peoria, and other tribes, and their families, upon their making declaration, before the district court of the United States, of their intention to become citizens, (15 Stat. 517, 520, 521;) but, after reciting that some of the Wyandotts, who had become citizens under the treaty of 1855, were "unfitted for the responsibilities of citizenship," and enacting that a register of the whole people of this tribe, resident in Kansas or elsewhere, should be taken, under the direction of the secretary of the interior, showing the names of "all who declare their desire to be and remain Indians and in a tribal condition," and of incompetents and orphans as described in the treaty of 1855, and that such persons, and those only, should thereafter constitute the tribe, it provided that "no one who has heretofore consented to become a citizen, nor the wife or children of any such person, shall be allowed to become members of the tribe, except by the free consent of the tribe after its new organization, and unless the agent shall certify that such party is, through poverty or incapacity, unfit to continue in the exercise of the responsibilities of citizenship of the United States, and likely to become a public charge." 15 Stat. 514, 516.

Since the ratification of the fourteenth amendment, congress has passed several acts for naturalizing Indians of certain tribes, which would have been superfluous if they were, or might become without any action of the government, citizens of the United States. By the act of July 15, 1870, c. 296, § 10, for instance, it was provided that if at any time thereafter any of the Winnebago Indians in the state of Minnesota should desire to become citizens of the United States, they should make application to the district court of the United States for the district of Minnesota, and in open court make the same proof, and take the same oath of allegiance as is provided by law for the naturalization of aliens, and should also make proof, to the satisfaction of the court, that they were sufficiently intelligent and prudent to control their affairs and interests, that they had adopted the habits of civilized life, and had for at least five years before been able to support themselves and their families; and thereupon they should be declared by the court to be citizens of the United States, the declaration entered of record, and a certificate thereof given to the applicant; and the secretary of the interior, upon presentation of that certificate, might issue to them patents in fee-simple, with power of alienation, of the lands already held by them in severalty, and might cause to be paid to them their proportion of the money and effects of the tribe held in trust under any treaty or law of the United States; and thereupon such persons should cease to be members of the tribe; and the lands so patented to them should be subject

to levy, taxation, and sale in like manner with the property of other citizens. 16 Stat. 361. By the act of March 3, 1873, c. 332, § 3, similar provision was made for the naturalization of any adult members of the Miami tribe in Kansas, and of their minor children. 17 Stat. 632. And the act of March 3, 1865, c. 127, before referred to, making corresponding provision for the naturalization of any of the chiefs, warriors, or heads of families of the Stockbridge Indians, is re-enacted in section 2312 of the Revised Statutes.

The act of January 25, 1871, c. 38, for the relief of the Stockbridge and Munsee Indians in the state of Wisconsin, provided that "for the purpose of determining the persons who are members of said tribes, and the future relation of each to the government of the United States," two rolls should be prepared under the direction of the commissioner of Indian affairs, signed by the sachem and councilors of the tribe, certified by the person selected by the commissioner to superintend the same, and returned to the commissioner; the one, to be denominated the citizen roll, of the names of all such persons of full age, and their families, "as signify their desire to separate their relations with said tribe and to become citizens of the United States," and the other to be denominated the Indian roll, of the names of all such "as desire to retain their tribal character and continue under the care and guardianship of the United States;" and that those rolls, so made and returned, should be held as a full surrender and relinquishment, on the part of all those of the first class, of all claims to be known or considered as members of the tribe, or to be interested in any provision made or to be made by the United States for its benefit, "and they and their descendants shall thenceforth be admitted to all the rights and privileges of citizens of the United States." 16 Stat. 406.

The pension act exempts Indian claimants of pensions for service in the army or navy from the obligation to take the oath to support the constitution of the United States. Act of March 3, 1873, c. 234, § 28, (17 Stat. 574; Rev. St. § 4721.) The recent statutes concerning homesteads are quite inconsistent with the theory that Indians do or can make themselves independent citizens by living apart from their tribe. The act of March 3, 1875, c. 131, § 15, allowed to "any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his tribal relations," the benefit of the homestead acts, but only upon condition of his "making satisfactory proof of such abandonment, under rules to be prescribed by the secretary of the interior;" and further provided that his title in the homestead should be absolutely inalienable for five years from the date of the patent, and that he should be entitled to share in all annuities, tribal funds, lands, and other property, as if he had maintained his tribal relations. 18 Stat. 420. And the act of March 3, 1884, c 180, § 1, while it allows Indians "located on public lands" to "avail themselves of the homestead laws as fully, and to the same extent, as may now be done by citizens of the United States," provides that the form and the legal effect of the patent shall be that the United States does and will hold the land for twenty-five years in trust for the Indian making the entry, and his widow and heirs, and will then convey it in fee to him or them 23 Stat. 96. The national legislation has tended more and more towards the education and civilization of the Indians, and fitting them to be citizens. But the question whether any Indian tribes, or any members thereof, have become so far advanced in civilization that they should be let out of the state of pupilage, and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are and whose citizens they seek to become, and not by each Indian for himself. There is nothing in the statutes or decisions, referred to by counsel, to control the conclusion to which we have been brought by a consideration of the language of the fourteenth amendment, and of the condition of the Indians at the time of its proposal and ratification.

The act of July 27, 1868, c. 249, declaring the right of expatriation to be a natural and inherent right of all people, and reciting that "in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship," while it affirms the right of every man to expatriate himself from one country, contains nothing to enable him to become a citizen of another without being naturalized under its authority. 15 St. 223; Rev. St. § 1999. The provision of the act of congress of March 3, 1871, c. 120, that "hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty," is coupled with a provision that the obligation of any treaty already lawfully made is not to be thereby invalidated or impaired; and its utmost possible effect is to require the Indian tribes to be dealt with for the future through the legislative and not through the treaty-making power. 16 St. 566; Rev. St. § 2079.

In the case of U. S. v. Elm, 23 Int. Rev. Rec. 419, decided by Judge Wallace in the district court of the United States for the Northern district of New York, the Indian who was held to have a right to vote in 1876 was born in the state of New York, one of the remnants of a tribe which had ceased to exist as a tribe in that state; and by a statute of the state it had been enacted that any native Indian might purchase, take, hold,

and convey lands, and, whenever he should have become a freeholder to the value of $100, should be liable to taxation, and to the civil jurisdiction of the courts, in the same manner and to the same extent as a citizen. N. Y. St. 1843, c. 87. The condition of the tribe from which he derived his origin, so far as any fragments of it remained within the state of New York, resembled the condition of those Indian nations of which Mr. Justice Johnson said in Fletcher v. Peck, 6 Cranch, 87, 146, that they "have totally extinguished their national fire, and submitted themselves to the laws of the states;" and which Mr. Justice McLean had in view when he observed in Worcester v. Georgia, 6 Pet. 515, 580, that in some of the old states "where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the power of self-government, the laws of the state have been extended over them, for the protection of their persons and property." See, also, as to the condition of Indians in Massachusetts, remnants of tribes never recognized by the treaties or legislative or executive acts of the United States as distinct political communities, Danzell v. Webquish, 108 Mass. 133; Pells v. Webquish, 129 Mass. 469; Mass. St. 1862, c. 184; 1869, c. 463.

The passages cited as favorable to the plaintiff, from the opinions delivered in Ex parte Kenyon, 5 Dill. 385, 390, Fed. Cas. No. 7,720, in Ex parte Reynolds, 5 Dill. 394, 397, Fed. Cas. No. 11,719, and in U. S. v. Crook, 5 Dill. 453, 464, Fed. Cas. No. 14,891, were obiter dicta. The Case of Reynolds was an indictment, in the circuit court of the United States for the Western district of Arkansas, for a murder in the Indian country, of which that court had jurisdiction if either the accused or the dead man was not an Indian, and was decided by Judge Parker in favor of the jurisdiction, upon the ground that both were white men, and that, conceding the one to be an Indian by marriage, the other never was an Indian in any sense. 5 Dill. 397, 404. Each of the other two cases was a writ of habeas corpus; and any person, whether a citizen or not, unlawfully restrained of his liberty, is entitled to that writ. Case of the Hottentot Venus, 13 East, 195; Case of Dos Santos, 2 Brock. 493, Fed. Cas. No. 4,016, In re Kaine, 14 How. 103. In Kenyon's Case, Judge Parker held that the court in which the prisoner had been convicted had no jurisdiction of the subject-matter, because the place of the commission of the act was beyond the territorial limits of its jurisdiction, and, as was truly said, "this alone would be conclusive of this case." 5 Dill. 390, Fed. Cas. No. 7,720. In U. S. v. Crook, the Ponca Indians were discharged by Judge Dundy because the military officers who held them were taking them to the Indian Territory by force and without any lawful authority, (5 Dill. 468, Fed. Cas. No. 14,891;) and in the case at bar, as the record before us shows, that learned judge concurred in the judgment below for the defendant.

The law upon the question before us has been well stated by Judge Deady in the district court of the United States for the district of Oregon. In giving judgment against the plaintiff in a case resembling the case at bar, he said: "Being born a member of 'an independent political community'—the Chinook—he was not born subject to the jurisdiction of the United States—not born in its allegiance." McKay v. Campbell, 2 Sawy. 118, 134, Fed. Cas. No. 8,840. And in a later case he said: "But an Indian cannot make himself a citizen of the United States without the consent and co-operation of the government. The fact that he has abandoned his nomadic life or tribal relations, and adopted the habits and manners of civilized people, may be a good reason why he should be made a citizen of the United States, but does not of itself make him one. To be a citizen of the United States is a political privilege which no one, not born to, can assume without its consent in some form. The Indians in Oregon, not being born subject to the jurisdiction of the United States, were not born citizens thereof, and I am not aware of any law or treaty by which any of them have been made so since." U. S. v. Osborne, 6 Sawy. 406, 409, 2 Fed. 58. Upon the question whether any action of a state can confer rights of citizenship on Indians of a tribe still recognized by the United States as retaining its tribal existence, we need not, and do not, express an opinion, because the state of Nebraska is not shown to have taken any action affecting the condition of this plaintiff. See Chirac v. Chirac, 2 Wheat. 259; Fellows v. Blacksmith, 19 How. 366; U. S. v. Holliday, 3 Wall. 407, 420; U. S. v. Joseph, 94 U. S. 614, 618. The plaintiff, not being a citizen of the United States under the fourteenth amendment of the constitution, has been deprived of no right secured by the fifteenth amendment, and cannot maintain this action. Judgment affirmed.

Mr. Justice HARLAN and Mr. Justice WOODS, dissent.

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BROWN v. WALKER, United States Marshal.[1]

(70 Fed. 46.)

Circuit Court, W. D. Pennsylvania. Sept. 11, 1895.

Before ACHESON, Circuit Judge, and BUFFINGTON, District Judge.

Scott & Gordon, for petitioner. Harry Alvan Hall, for U. S. marshal.

BUFFINGTON, District Judge. On May 6, 1895, the grand jury of the district court of the United States for the Western district of Pennsylvania had under consideration an indictment charging E. F. Bates and Thomas R. Robinson, officers and agents of the Allegheny Valley Railway Company, with alleged violations of the interstate commerce law, approved February 4, 1887, and its supplements. Theodore F. Brown, the petitioner, who is the auditor of said company, appeared before the grand jury upon subpœna. He declined to answer certain questions as to freight charged and rebates given by said road as follows: "Q. Have you audited the accounts of the freight department of the said railway company during the years 1894 and 1895? A. I have. Q. Do you know whether or not the Allegheny Valley Railway Company transported for the Union Coal Company, during the months of July, August, and September, 1894, coal from any points on the low-grade division of said railroad company to Buffalo at a less rate than the established rates in force between the terminal points at the time of such transportation? A. That question, with all respect to the grand jury and yourself, I must decline to answer, for the reason that my answer would tend to accuse and criminate me. Q. Do you know whether the Allegheny Valley Railway Company, during the year 1894, paid to the Union Coal Company any rebate, refund, or commission on coal transported by said railroad company from points on its low-grade division to Buffalo, whereby the Union Coal Company obtained a transportation of such coal between the said terminal points at a less rate than the open tariff rate, or the rate established by said company? If you have such knowledge, state the amount of such rebates or drawbacks or commissions paid, to whom paid, the date of the same, or on what shipments, and state fully all the particulars within your knowledge relating to such transaction or transactions. A. That question I must also decline to answer for the reasons already given."

Upon report of these facts made by the grand jury through George D. Howell, Esq., its foreman, the district court granted a rule upon Mr. Brown to show cause why he should not answer the questions or be adjudged guilty of contempt. He again refused for the same reasons, and on report thereof made to the court, he was by it adjudged guilty of contempt, sentenced to pay a fine, and committed to the custody of the marshal until he paid the same and answered the questions. On May 7, 1895, he presented a petition to the circuit court for a writ of habeas corpus. In it, after setting forth the above facts, he alleged his answers would tend to incriminate him, and if compelled to answer, he would be forced to be a witness against himself, contrary to the provisions of the amendment to the constitution; that the act compelling him to testify was unconstitutional; that the district court had no jurisdiction to require him to answer these questions; and that his detention by the marshal was unlawful. Thereupon the writ issued, and to it the marshal made return justifying petitioner's detention under the order of the district court.

The fifth amendment to the constitution provides: "No person * * * shall be compelled, in any criminal case, to be a witness against himself." And in Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, it was held this provision was not confined to a criminal case against the party himself; that its object was to insure that one should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show he had committed a crime. It was also held that Rev. St. § 860, which provides that no evidence given by a witness shall be in any manner used against him in any court of the United States in any criminal proceedings did "not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitution for that prohibition," and afforded "no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party."

Following this decision, the act of February 11, 1893, was passed, which provides: "That no person shall be excused from attending and testifying * * * in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of congress, entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise * * * in any such case or proceeding."

The constitutionality of this act is now

[1] Concurring opinion of Acheson, Circuit Judge, omitted.

challenged on the ground—First, that the constitutional provision already quoted is a protection not only from pains and penalties, but from the infamy which follows the disclosure of the commission of a crime, and that the act simply relieves from pains and penalties; second, that the act does not give a protection as broad as the constitutional privileges, because it places the witness under the necessity of proving the fact, etc., of his having been called to testify, and leaves him exposed to the jeopardy of conviction; and, third, the act is in substance a pardon and an infringement on the pardoning power vested by the constitution in the executive.

The question is one of grave importance to the petitioner, as involving his alleged constitutional rights, and to the general public, as involving the enforcement of the interstate commerce law. It is clear, if the witness is justified in his refusal to answer, the enforcement of that law is virtually impossible, since violations thereof can be proved only by those who would refuse to answer. Unfortunate as this might be, still, if the enforcement of any act of congress sacrifices the constitutional rights of the citizen, the act must yield to the higher law of the constitution. But when a statute has been passed by the legislative branch of the government, the judicial branch will act with great caution in declaring it unconstitutional, and will do so "only," as Chief Justice Black said, in Sharpless v. Mayor, etc., of Philadelphia, 21 Pa. St. 164, "when it violates the constitution clearly, palpably, plainly, and in such manner as to leave no doubt or hesitation on our minds." For, as Chief Justice Marshall said, in Fletcher v. Peck, 6 Cranch, 126: "The question, whether a law be void for its repugnancy to the constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

The provision that "no person * * * shall be compelled in any criminal case to be a witness against himself" placed the bulwark of constitutional protection around that which had long been a recognized right of the citizen under the rules of evidence, and was summed up in the time-honored maxim, "Nemo tenetur seipsum accusare." 1 Starkie, Ev. 71, 191; 1 Greenl. Ev. § 451; Whart. Cr. Ev. § 463, and cases cited on page 547 of 142 U. S., and page 195 of 12 Sup. Ct. It was meant to protect him from self-crimination, to exempt him from making disclosures which might lead to his subsequent conviction. It was embodied in an amendment which, in its other provisions, secured his rights in criminal cases, viz. the safeguard of a precedent indictment or presentment,—against his being put twice in jeopardy for the same offense,—and insured him due process of law when life and liberty were at stake. Clearly, its purpose was to shield him from compulsory disclosures which might lead to his conviction of a crime. If the constitutional purpose was to shield him from disclosures which would merely tend to humiliate or disgrace him in the eyes of his fellows, it was not so expressed. Judging from the character of the instrument itself, which is admittedly a model of simplicity and clearness, it is fair to assume that if such a right were deemed worthy of the dignity of constitutional protection, it would have been stated in words so plain "that he may run that readeth it." But the obligation of a witness to answer questions of that character, if pertinent to the issue, is well recognized. 1 Rosc. Cr. Ev. 234; 1 Greenl. Ev. (14th Ed.) §§ 455, 456, 458, 459; Thomp. Trials, § 287; Jennings v. Prentice, 39 Mich. 421. And in Parkhurst v. Lowten, 1 Mer. 400, Lord Eldon said: "Upon the question of character, I hold that, supposing a man to be liable to penalty or forfeiture, provided he is sued within a limited time, and that the suit is not commenced till after the limitation expired, he is bound to answer fully, notwithstanding his answer may tend to cast a very great degree of reflection upon his character and conduct."

In Com. v. Roberts, Brightly, N. P. 109, it was held it was competent for the legislature of Pennsylvania to pass an act under which a witness may be compelled to answer questions which may not show him to be criminal, but which involve him in shame and reproach.

To our mind it is clear the infamy or disgrace to a witness which may result from disclosures made by him are not matters against which the constitution shields, and that so long as such disclosures do not concern a crime of which he may be convicted, the provision quoted does not apply. But does the act of congress give the petitioner as broad protection as the constitutional provision? Unquestionably it does. It says he "shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify or produce evidence, documentary or otherwise." This affords him absolute indemnity against future prosecution for the offense to which the question relates. The act of testifying has, so far as he is concerned, wiped out the crime. It has excepted him from the operation of the law, and, as to him, that which in others is a crime has been expunged from the stat-

ute books. If, then, there exists, as to him, no crime, there can be no self-crimination in any testimony he gives, and if there can be no self-crimination, if neither conviction, judgment, nor sentence can directly or indirectly result from his testimony, what need has he for the constitutional provision? For, says Broom (Leg. Max. p. 654), in speaking of the maxim quoted above, "Where, however, the reason for the privilege of the witness or party interrogated ceases, the privilege will cease also; as, if the prosecution to which the witness might be exposed on his liability to a penalty or forfeiture is barred by lapse of time, or if the offense has been pardoned, or the penalty or forfeiture waived,"—a doctrine approved, as we have seen above, by Lord Eldon.

In practical effect, the legislative act throws a greater safeguard around the petitioner than the constitutional provision. Before he testified, he could have been charged with a violation of the interstate commerce law, in which case the amendments only protected him against compulsory self-crimination. He was liable to a possible verdict of guilty if the necessary proofs were given, but under the legislative act, when he has testified the law excepts him from its operation, makes that which was before a possible crime a mere matter of indifference, and shields him from subsequent prosecution. The sweeping words of the statute,—as broad as human language can make them,—afford absolute indemnity to the witness. No crime exists as to him. It is not a pardon,—not an act of amnesty. No charge can be made against him, for it is illegal to even prosecute him, viz. "No person shall be prosecuted." To our mind, the constitutional provision in words and purpose is plain. In the Counselman Case, the witness was protected from the manifestly self-criminating answers which would have disclosed facts upon which a prosecution, to which he was still left exposed, could be based. But, owing to the act of 1893, no such consequence can ensue if the present petitioner is made to answer. Such being the case, the constitutional provision does not concern him, and if it does not, the act which compels him to testify is not unconstitutional.

In reaching this conclusion we have given due regard to the case of U. S. v. James, 60 Fed. 257, where the act was held to be unconstitutional. While we regret to differ from this only federal decision on the matter, we find support for our position in the opinion of the supreme court of New Hampshire, in State v. Nowell, 58 N. H. 314, and of the supreme court of California in Ex parte Cohen (Cal.) 38 Pac. 364.

The prayer of the petitioner to be discharged will therefore be denied, and he will be remanded to the custody of the marshal.

ACHESON, Circuit Judge, concurs.

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TRUSTEES OF DARTMOUTH COLLEGE v. WOODWARD.[1]

(4 Wheat. 518.)

Supreme Court of the United States. Feb. Term, 1819.

Error to the superior court of the state of New Hampshire.

This was an action of trover instituted in a court of the state of New Hampshire by the trustees of Dartmouth College against William W. Woodward. There was a judgment for defendant which was affirmed by the superior court of the state of New Hampshire and plaintiffs brought error. Reversed.

Webster & Hopkinson, for plaintiffs in error.

Mr. Holmes and The Attorney-General, contra.

Mr. Chief Justice MARSHALL delivered the opinion of the court.

This is an action of trover, brought by the trustees of Dartmouth College, against William H. Woodward, in the state court of New Hampshire, for the book of records, corporate seal, and other corporate property, to which the plaintiffs allege themselves to be entitled.

A special verdict, after setting out the rights of the parties, finds for the defendant, if certain acts of the legislature of New Hampshire, passed on the 27th of June, and on the 18th of December, 1816, be valid, and binding on the trustees without their assent, and not repugnant to the constitution of the United States; otherwise it finds for the plaintiffs.

The superior court of judicature of New Hampshire rendered a judgment upon this verdict for the defendant, which judgment has been brought before this court by writ of error. The single question now to be considered is, do the acts to which the verdict refers violate the constitution of the United States?

This court can be insensible neither to the magnitude nor delicacy of this question. The validity of a legislative act is to be examined; and the opinion of the highest law tribunal of a state is to be revised; an opinion which carries with it intrinsic evidence of the diligence, of the ability, and the integrity with which it was formed. On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared that, in no doubtful case, would it pronounce a legislative act to be contrary to the constitution. But the American people have said, in the constitution of the United States, that "no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts." In the same instrument they have also said, "that the judicial power shall extend to all cases in law and equity arising under the constitution." On the judges of this court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the constitution of our country has placed beyond legislative control; and, however irksome the task may be, this is a duty from which we dare not shrink.

The title of the plaintiffs originates in a charter, dated the 13th day of December, in the year 1769, incorporating twelve persons therein mentioned, by the name of "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who are to govern the college, to fill up all vacancies which may be created in their own body.

The defendant claims under three acts of the legislature of New Hampshire, the most material of which was passed on the 27th of June, 1816, and is entitled, "An act to amend the charter, and enlarge and improve the corporation of Dartmouth College." Among other alterations in the charter, this act increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the state, and creates a board of overseers, with power to inspect and control the most important acts of the trustees. This board consists of twenty-five persons. The president of the senate, the speaker of the house of representatives of New Hampshire, and the governor and lieutenant governor of Vermont, for the time being, are to be members ex officio. The board is to be completed by the governor and council of New Hampshire, who are also empowered to fill all vacancies which may occur. The acts of the 18th and 26th of December are supplemental to that of the 27th of June, and are principally intended to carry that act into effect.

The majority of the trustees of the college have refused to accept this amended charter, and have brought this suit for the corporate property, which is in possession of a person holding by virtue of the acts which have been stated.

It can require no argument to prove, that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application it is stated, that large contributions have been made for the object, which will be conferred on the corporation, as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely, in this transaction, every ingredient of a complete and legitimate contract is to be found.

The points for consideration are.

1. Is this contract protected by the constitution of the United States?

[1] Concurring opinions of Mr. Justice Washington and Mr. Justice Story, and dissenting opinion of Mr. Justice Duvall, omitted.

2. Is it impaired by the acts under which the defendant holds?

1. On the first point it has been argued, that the word "contract," in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices held within a state for state purposes, and to many of those laws concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation; which deeply concern the public, and which, to preserve good government, the public judgment must control. That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a state, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term "contract" must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt; and to restrain the legislature in future from violating the right to property. That anterior to the formation of the constitution, a course of legislation had prevailed in many, if not in all, of the states, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the state legislatures were forbidden "to pass any law impairing the obligation of contracts," that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that since the clause in the constitution must, in construction, receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted. That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other. When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional.

The parties in this case differ less on general principles, less on the true construction of the constitution in the abstract, than on the application of those principles to this case, and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the state of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.

But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves; there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property, may yet retain such an interest in the preservation of their own arrangements, as to have a right to insist that those arrangements shall be held sacred. Or, if they have themselves disappeared, it becomes a subject of serious and anxious inquiry, whether those whom they have legally empowered to represent them forever, may not assert all the rights which they possessed, while in being; whether, if they be without personal representatives who may feel injured by a violation of the compact, the trustees be not so completely their representatives in the eye of the law, as to stand in their place, not only as respects the government of the college, but also as respects the maintenance of the college charter. It becomes then the duty of the court most seriously to examine this charter, and to ascertain its true character.

From the instrument itself, it appears, that about the year 1754, the Rev. Eleazer Wheelock established, at his own expense, and on his own estate, a charity school for the instruction of Indians in the Christian

religion. The success of this institution inspired him with the design of soliciting contributions in England, for carrying on and extending his undertaking. In this pious work, he employed the Rev. Nathaniel Whitaker, who, by virtue of a power of attorney from Dr. Wheelock, appointed the Earl of Dartmouth and others, trustees of the money which had been and should be contributed; which appointment Dr. Wheelock confirmed by a deed of trust authorizing the trustees to fix on a site for the college. They determined to establish the school on Connecticut river, in the western part of New Hampshire; that situation being supposed favorable for carrying on the original design among the Indians, and also for promoting learning among the English; and the proprietors in the neighborhood having made large offers of land, on condition that the college should there be placed. Dr. Wheelock then applied to the crown for an act of incorporation; and represented the expediency of appointing those whom he had, by his last will, named as trustees in America, to be members of the proposed corporation. "In consideration of the premises," "for the education and instruction of the youth of the Indian tribes," &c., "and also of English youth, and any others," the charter was granted, and the trustees of Dartmouth College were by that name created a body corporate, with power, for the use of the said college, to acquire real and personal property, and to pay the president, tutors, and other officers of the college, such salaries as they shall allow.

The charter proceeds to appoint Eleazer Wheelock, "the founder of said college," president thereof, with power, by his last will, to appoint a successor, who is to continue in office until disapproved by the trustees. In case of vacancy, the trustees may appoint a president, and in case of the ceasing of a president, the senior professor or tutor, being one of the trustees, shall exercise the office, until an appointment shall be made. The trustees have power to appoint and displace professors, tutors, and other officers, and to supply any vacancies which may be created in their own body, by death, resignation, removal, or disability; and also to make orders, ordinances, and laws, for the government of the college, the same not being repugnant to the laws of Great Britain, or of New Hampshire, and not excluding any person on account of his speculative sentiments in religion, or his being of a religious profession different from that of the trustees.

This charter was accepted, and the property, both real and personal, which had been contributed for the benefit of the college, was conveyed to, and vested in, the corporate body.

From this brief review of the most essential parts of the charter, it is apparent, that the funds of the college consisted entirely of private donations. It is, perhaps, not very important, who were the donors. The probability is, that the Earl of Dartmouth, and the other trustees in England, were, in fact, the largest contributors. Yet the legal conclusion, from the facts recited in the charter, would probably be, that Dr. Wheelock was the founder of the college.

The origin of the institution was, undoubtedly, the Indian charity school, established by Dr. Wheelock, at his own expense. It was at his instance, and to enlarge this school, that contributions were solicited in England. The person soliciting these contributions was his agent; and the trustees, who received the money, were appointed by, and act under, his authority. It is not too much to say, that the funds were obtained by him, in trust, to be applied by him to the purposes of his enlarged school. The charter of incorporation was granted at his instance. The persons named by him in his last will, as the trustees of his charity school, compose a part of the corporation, and he is declared to be the founder of the college, and its president for life. Were the inquiry material, we should feel some hesitation in saying, that Dr. Wheelock was not, in law, to be considered as the founder (1 Bl. Comm. 481) of this institution, and as possessing all the rights appertaining to that character. But be this as it may, Dartmouth College is really endowed by private individuals, who have bestowed their funds for the propagation of the Christian religion among the Indians, and for the promotion of piety and learning generally. From these funds the salaries of the tutors are drawn; and these salaries lessen the expense of education to the students. It is then an eleemosynary (1 Bl. Comm. 471), and, as far as respects its funds, a private corporation.

Do its objects stamp on it a different character? Are the trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority?

That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not the will of the donor, becomes the law of the donation? These questions are of serious moment to society, and deserve to be well considered.

Doctor Wheelock, as the keeper of his charity school, instructing the Indians in the art

of reading, and in our holy religion; sustaining them at his own expense, and on the voluntary contributions of the charitable, could scarcely be considered as a public officer, exercising any portion of those duties which belong to government; nor could the legislature have supposed, that his private funds, or those given by others, were subject to legislative management, because they were applied to the purposes of education. When afterwards, his school was enlarged, and the liberal contributions made in England and in America, enabled him to extend his cares to the education of the youth of his own country, no change was wrought in his own character, or in the nature of his duties. Had he employed assistant tutors with the funds contributed by others, or had the trustees in England established a school, with Dr. Wheelock at its head, and paid salaries to him and his assistants, they would still have been private tutors; and the fact that they were employed in the education of youth, could not have converted them into public officers, concerned in the administration of public duties, or have given the legislature a right to interfere in the management of the fund. The trustees, in whose care that fund was placed by the contributors, would have been permitted to execute their trust, uncontrolled by legislative authority.

Whence, then, can be derived the idea, that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public, for public objects? Not from the source whence its funds were drawn; for its foundation is purely private and eleemosynary. Not from the application of those funds; for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government. Is it from the act of incorporation? Let this subject be considered.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances, for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person. It is no more a state instrument, than a natural person exercising the same powers would be. If, then, a natural person, employed by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer, or be considered as a member of the civil government, how is it that this artificial being, created by law, for the purpose of being employed by the same individuals for the same purposes, should become a part of the civil government of the country? Is it because its existence, its capacities, its powers, are given by law? Because the government has given it the power to take and to hold property in a particular form, and for particular purposes, has the government a consequent right substantially to change that form, or to vary the purposes to which the property is to be applied? This principle has never been asserted or recognized, and is supported by no authority. Can it derive aid from reason?

The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration, of the grant. In most eleemosynary institutions, the object would be difficult, perhaps unattainable, without the aid of a charter of incorporation. Charitable, or public-spirited individuals, desirous of making permanent appropriations for charitable or other useful purposes, find it impossible to effect their design, securely and certainly, without an incorporating act. They apply to the government, state their beneficent object, and offer to advance the money necessary for its accomplishment, provided the government will confer on the instrument, which is to execute their designs, the capacity to execute them. The proposition is considered and approved. The benefit to the public is considered as an ample compensation for the faculty it confers, and the corporation is created. If the advantages to the public constitute a full compensation for the faculty it gives, there can be no reason for exacting a further compensation, by claiming a right to exercise over this artificial being a power which changes its nature, and touches the fund, for the security and application of which it was created. There can be no reason for implying in a charter, given for a valuable consideration, a power which is not only not expressed, but is in

direct contradiction to its express stipulations.

From the fact, then, that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government, created for its purposes. The same institutions, created for the same objects, though not incorporated, would be public institutions, and, of course, be controllable by the legislature. The incorporating act neither gives nor prevents this control. Neither, in reason, can the incorporating act change the character of a private eleemosynary institution.

We are next led to the inquiry, for whose benefit the property given to Dartmouth College was secured? The counsel for the defendant have insisted, that the beneficial interest is in the people of New Hampshire. The charter, after reciting the preliminary measures which had been taken, and the application for an act of incorporation, proceeds thus: "Know ye, therefore, that we, considering the premises, and being willing to encourage the laudable and charitable design of spreading Christian knowledge among the savages of our American wilderness, and, also, that the best means of education be established, in our province of New Hampshire, for the benefit of said province, do, of our special grace," &c. Do these expressions bestow on New Hampshire any exclusive right to the property of the college, any exclusive interest in the labors of the professors? Or do they merely indicate a willingness that New Hampshire should enjoy those advantages which result to all from the establishment of a seminary of learning in the neighborhood? On this point we think it impossible to entertain a serious doubt. The words themselves, unexplained by the context, indicate, that the "benefit intended for the province" is that which is derived from "establishing the best means of education therein;" that is, from establishing in the province Dartmouth College, as constituted by the charter. But if these words, considered alone, could admit of doubt, that doubt is completely removed by an inspection of the entire instrument.

The particular interests of New Hampshire never entered into the mind of the donors, never constituted a motive for their donation. The propagation of the Christian religion among the savages, and the dissemination of useful knowledge among the youth of the country, were the avowed and the sole objects of their contributions. In these, New Hampshire would participate; but nothing particular or exclusive was intended for her. Even the site of the college was selected, not for the sake of New Hampshire, but because it was "most subservient to the great ends in view," and because liberal donations of land were offered by the proprietors, on condition that the institution should be there established. The real advantages from the location of the college, are, perhaps, not less considerable to those on the west, than to those on the east side of Connecticut river. The clause which constitutes the incorporation, and expresses the objects for which it was made, declares those objects to be the instruction of the Indians, "and also of English youth, and any others." So that the objects of the contributors, and the incorporating act, were the same; the promotion of Christianity, and of education generally, not the interests of New Hampshire particularly.

From this review of the charter, it appears, that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors, to the specified objects of that bounty; that its trustees or governors were originally named by the founder, and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government; but a charity school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation.

Yet a question remains to be considered, of more real difficulty, on which more doubt has been entertained than on all that have been discussed. The founders of the college, at least those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest, so long as the corporation shall exist. Could they be found, they are unaffected by any alteration in its constitution, and probably regardless of its form, or even of its existence. The students are fluctuating, and no individual among our youth has a vested interest in the institution, which can be asserted in a court of justice. Neither the founders of the college, nor the youth for whose benefit it was founded, complain of the alteration made in its charter, or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected. Can this be such a contract as the constitution intended to withdraw from the power of state legislation? Contracts, the parties to which have a vested beneficial interest, and those only, it has been said, are the objects about which the constitution is solicitous, and to which its protection is extended.

The court has bestowed on this argument the most deliberate consideration, and the

result will be stated. Dr. Wheelock, acting for himself, and for those who, at his solicitation, had made contributions to his school, applied for this charter, as the instrument which should enable him and them to perpetuate their beneficent intention. It was granted. An artificial, immortal being, was created by the crown, capable of receiving and distributing forever, according to the will of the donors, the donations which should be made to it. On this being, the contributions which had been collected were immediately bestowed. These gifts were made, not indeed to make a profit for the donors or their posterity, but for something in their opinion of inestimable value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated, is the perpetual application of the fund to its object, in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives. They are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal. So with respect to the students who are to derive learning from this source. The corporation is a trustee for them also. Their potential rights, which, taken distributively, are imperceptible, amount, collectively, to a most important interest. These are, in the aggregate, to be exercised, asserted, and protected, by the corporation. They were as completely out of the donors, at the instant of their being vested in the corporation, and as incapable of being asserted by the students, as at present.

According to the theory of the British constitution, their parliament is omnipotent. To annul corporate rights might give a shock to public opinion, which that government has chosen to avoid; but its power is not questioned. Had parliament, immediately after the emanation of this charter, and the execution of those conveyances which followed it, annulled the instrument, so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. Yet then, as now, the donors would have had no interest in the property; then, as now, those who might be students would have had no rights to be violated; then, as now, it might be said, that the trustees, in whom the rights of all were combined, possessed no private, individual, beneficial interest in the property confided to their protection. Yet the contract would at that time have been deemed sacred by all. What has since occurred to strip it of its inviolability? Circumstances have not changed it. In reason, in justice, and in law, it is now what it was in 1769.

This is plainly a contract to which the donors, the trustees, and the crown, (to whose rights and obligations New Hampshire succeeds,) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the constitution, and within its spirit also, unless the fact that the property is invested by the donors in trustees, for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the constitution.

It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the constitution, when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.

On what safe and intelligible ground can this exception stand? There is no expression in the constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it. In the absence of all authority of this kind, is there, in the nature and reason of the case itself, that which would sustain a construction of the constitution, not warranted by its words? Are contracts of this description of a character to excite so little interest, that we must exclude them from the provisions of the constitution, as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously demand their remaining exposed to legislative alteration, as to compel us, or rather permit us to say, that these words, which

were introduced to give stability to contracts, and which, in their plain import, comprehend this contract, must yet be so construed as to exclude it?

Almost all eleemosynary corporations, those which are created for the promotion of religion, of charity, or of education, are of the same character. The law of this case is the law of all. In every literary or charitable institution, unless the objects of the bounty be themselves incorporated, the whole legal interest is in trustees, and can be asserted only by them. The donors, or claimants of the bounty, if they can appear in court at all, can appear only to complain of the trustees. In all other situations, they are identified with, and personated by, the trustees; and their rights are to be defended and maintained by them. Religion, charity, and education, are, in the law of England, legatees or donees, capable of receiving bequests or donations in this form. They appear in court, and claim or defend by the corporation. Are they of so little estimation in the United States, that contracts for their benefit must be excluded from the protection of words which, in their natural import, include them? Or do such contracts so necessarily require new modelling, by the authority of the legislature, that the ordinary rules of construction must be disregarded in order to leave them exposed to legislative alteration?

All feel that these objects are not deemed unimportant in the United States. The interest which this case has excited, proves that they are not. The framers of the constitution did not deem them unworthy of its care and protection. They have, though in a different mode, manifested their respect for science, by reserving to the government of the Union the power "to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." They have, so far, withdrawn science and the useful arts, from the action of the state governments. Why, then, should they be supposed regardless of contracts made for the advancement of literature, as to intend to exclude them from provisions, made for the security of ordinary contracts between man and man? No reason for making this supposition is perceived.

If the insignificance of the object does not require that we should exclude contracts respecting it from the protection of the constitution, neither, as we conceive, is the policy of leaving them subject to legislative alteration, so apparent as to require a forced construction of that instrument in order to effect it. These eleemosynary institutions do not fill the place which would otherwise be occupied by government, but that which would otherwise remain vacant. They are complete acquisitions to literature. They are donations to education; donations, which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind, to enable us to determine, that one great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable. It is probable, that no man ever was, and that no man ever will be, the founder of a college, believing at the time, that an act of incorporation constitutes no security for the institution; believing, that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature. All such gifts are made in the pleasing, perhaps delusive hope, that the charity will flow forever in the channel which the givers have marked out for it. If every man finds in his own bosom strong evidence of the universality of this sentiment, there can be but little reason to imagine that the framers of our constitution were strangers to it, and that, feeling the necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy and repeated interferences produced the most perplexing and injurious embarrassments, they still deemed it necessary to leave these contracts subject to those interferences. The motives for such an exception must be very powerful, to justify the construction which makes it.

The motives suggested at the bar, grow out of the original appointment of the trustees, which is supposed to have been in a spirit hostile to the genius of our government, and the presumption, that, if allowed to continue themselves, they now are, and must remain forever, what they originally were. Hence is inferred the necessity of applying to this corporation, and to other similar corporations, the correcting and improving hand of the legislature.

It has been urged repeatedly, and certainly with a degree of earnestness which attracted attention, that the trustees, deriving their power from a regal source, must, necessarily, partake of the spirit of their origin; and that their first principles, unimproved by that resplendent light which has been shed around them, must continue to govern the college, and to guide the students. Before we inquire into the influence which this argument ought to have on the constitutional question, it may not be amiss to examine the fact on which it rests. The first trustees were undoubtedly named in the charter by the crown; but at whose suggestion were they named? By whom were they selected? The charter informs us. Dr. Wheelock had represented, "that, for many weighty reasons, it would be expedient, that the gentlemen whom he had already nominated, in his last will, to be trustees in America, should be of the corporation now proposed." When, afterwards, the trustees are named

in the charter, can it be doubted that the persons mentioned by Dr. Wheelock, in his will, were appointed? Some were probably added by the crown, with the approbation of Dr. Wheelock. Among these is the doctor himself. If any others were appointed at the instance of the crown, they are the governor, three members of the council, and the speaker of the house of representatives, of the colony of New Hampshire. The stations filled by these persons ought to rescue them from any other imputation than too great a dependence on the crown. If, in the Revolution that followed, they acted under the influence of this sentiment, they must have ceased to be trustees; if they took part with their countrymen, the imputation which suspicion might excite, would no longer attach to them. The original trustees, then, or most of them, were named by Dr. Wheelock, and those who were added to his nomination, most probably with his approbation, were among the most eminent and respectable individuals in New Hampshire.

The only evdence which we possess of the character of Dr. Wheelock, is furnished by this charter. The judicious means employed for the accomplishment of his object, and the success which attended his endeavors, would lead to the opinion, that he united a sound understanding to that humanity and benevolence which suggested his undertaking. It surely cannot be assumed, that his trustees were selected without judgment. With as little probability can it be assumed, that, while the light of science and of liberal principles pervades the whole community, these originally benighted trustees remain in utter darkness, incapable of participating in the general improvement; that, while the human race is rapidly advancing, they are stationary. Reasoning à priori, we should believe that learned and intelligent men, selected by its patrons for the government of a literary institution, would select learned and intelligent men for their successors; men as well fitted for the government of a college as those who might be chosen by other means. Should this reasoning ever prove erroneous in a particular case, public opinion, as has been stated at the bar, would correct the institution. The mere possibility of the contrary would not justify a construction of the constitution, which should exclude these contracts from the protection of a provision whose terms comprehend them.

The opinion of the court, after mature deliberation, is, that this is a contract, the obligation of which cannot be impaired, without violating the constitution of the United States. This opinion appears to us to be equally supported by reason, and by the former decisions of this court.

2. We next proceed to the inquiry, whether its obligation has been impaired by those acts of the legislature of New Hampshire, to which the special verdict refers.

From the review of this charter, which has been taken, it appears that the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, was vested in the trustees. On the part of the crown, it was expressly stipulated that this corporation, thus constituted, should continue forever; and that the number of trustees should forever consist of twelve, and no more. By this contract, the crown was bound, and could have made no violent alteration in its essential terms, without impairing its obligation.

By the Revolution, the duties as well as the powers of government devolved on the people of New Hampshire. It is admitted, that among the latter was comprehended the transcendent power of parliament, as well as that of the executive department. It is too clear to require the support of argument, that all contracts and rights, respecting property, remained unchanged by the Revolution. The obligations, then, which were created by the charter to Dartmouth College, were the same in the new that they had been in the old government. The power of the government was also the same. A repeal of this charter at any time prior to the adoption of the present constitution of the United States, would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature, to be found in the constitution of the state. But the constitution of the United States has imposed this additional limitation, that the legislature of a state shall pass no act "impairing the obligation of contracts."

It has been already stated, that the act "to amend the charter, and enlarge and improve the corporation of Dartmouth College," increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the state, and creates a board of overseers, to consist of twenty-five persons, of whom twenty-one are also appointed by the executive of New Hampshire, who have power to inspect and control the most important acts of the trustees.

On the effect of this law, two opinions cannot be entertained. Between acting directly, and acting through the agency of trustees and overseers, no essential difference is perceived. The whole power of governing the college is transferred from trustees, appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire. The management and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the state. The will of the state is substituted for the will of the donors, in every essential operation of the college. This is not an immaterial change. The founders of the college contracted, not mere-

ly for the perpetual application of the funds which they gave, to the objects for which those funds were given; they contracted also, to secure that application by the constitution of the corporation. They contracted for a system, which should, as far as human foresight can provide, retain forever the government of the literary institution they had formed, in the hands of persons approved by themselves. This system is totally changed. The charter of 1769 exists no longer. It is reorganized; and reorganized in such a manner, as to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract, on the faith of which their property was given.

In the view which has been taken of this interesting case, the court has confined itself to the rights possessed by the trustees, as the assignees and representatives of the donors and founders, for the benefit of religion and literature. Yet it is not clear, that the trustees ought to be considered as destitute of such beneficial interest in themselves, as the law may respect. In addition to their being the legal owners of the property, and to their having a freehold right in the powers confided to them, the charter itself countenances the idea that trustees may also be tutors, with salaries. The first president was one of the original trustees; and the charter provides, that in case of vacancy in that office, "the senior professor or tutor, being one of the trustees, shall exercise the office of president, until the trustees shall make choice of, and appoint a president." According to the tenor of the charter, then, the trustees might, without impropriety, appoint a president and other professors from their own body. This is a power not entirely unconnected with an interest. Even if the proposition of the counsel for the defendant were sustained; if it were admitted, that those contracts only are protected by the constitution, a beneficial interest in which is vested in the party who appears in court to assert that interest; yet it is by no means clear, that the trustees of Dartmouth College have no beneficial interest in themselves.

But the court has deemed it unnecessary to investigate this particular point, being of opinion, on general principles, that in these private eleemosynary institutions, the body corporate, as possessing the whole legal and equitable interest, and completely representing the donors, for the purpose of executing the trust, has rights which are protected by the constitution

It results from this opinion, that the acts of the legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the constitution of the United States; and that the judgment on this special verdict ought to have been for the plaintiffs. The judgment of the state court must, therefore, be reversed.

* * * * * *

Mr. Justice WASHINGTON, Mr. Justice STORY, and Mr. Justice LIVINGSTON concurred.

Mr. Justice DUVALL dissents.

STONE et al. v. MISSISSIPPI.

(101 U. S. 814.)

Supreme Court of the United States. Oct., 1879.

Error to the supreme court of the state of Mississippi.

This was a proceeding in the nature of quo warranto instituted in a court of the state of Mississippi by the attorney-general against John B. Stone and others, carrying on a lottery or gift enterprise under the name of the Mississippi Agricultural, Educational, and Manufacturing Aid Society. There was a judgment for plaintiff, which was affirmed by the supreme court of Mississippi, and defendants brought error. Affirmed.

Philip Phillips, for plaintiffs in error. A. M. Clayton and Van H. Manning, for defendant in error.

Mr. Chief Justice WAITE delivered the opinion of the court.

It is now too late to contend that any contract which a state actually enters into when granting a charter to a private corporation is not within the protection of the clause in the constitution of the United States that prohibits states from passing laws impairing the obligation of contracts. Article 1, § 10. The doctrines of Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, announced by this court more than sixty years ago, have become so imbedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the constitution itself. In this connection, however, it is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain. If there is no contract, there is nothing in the grant on which the constitution can act. Consequently, the first inquiry in this class of cases always is, whether a contract has in fact been entered into, and if so, what its obligations are.

In the present case the question is whether the state of Mississippi, in its sovereign capacity, did by the charter now under consideration bind itself irrevocably by a contract to permit "the Mississippi Agricultural, Educational, and Manufacturing Aid Society," for twenty-five years, "to receive subscriptions, and sell and dispose of certificates of subscription which shall entitle the holders thereof to" "any lands, books, paintings, antiques, scientific instruments or apparatus, or any other property or thing that may be ornamental, valuable, or useful," "awarded to them" "by the casting of lots, or by lot, chance, or otherwise." There can be no dispute but that under this form of words the legislature of the state chartered a lottery company, having all the powers incident to such a corporation, for twenty-five years, and that in consideration thereof the company paid into the state treasury $5,000 for the use of a university, and agreed to pay, and until the commencement of this suit did pay, an annual tax of $1,000 and "one-half of one per cent on the amount of receipts derived from the sale of certificates or tickets." If the legislature that granted this charter had the power to bind the people of the state and all succeeding legislatures to allow the corporation to continue its corporate business during the whole term of its authorized existence, there is no doubt about the sufficiency of the language employed to effect that object, although there was an evident purpose to conceal the vice of the transaction by the phrases that were used. Whether the alleged contract exists, therefore, or not, depends on the authority of the legislature to bind the state and the people of the state in that way.

All agree that the legislature cannot bargain away the police power of a state. "Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the state; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police." Board of Excise v. Barrie, 34 N. Y. 657; Boyd v. Alabama, 94 U. S. 645. Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals. Beer Co. v. Massachusetts, 97 U. S. 25; Patterson v. Kentucky, Id. 501. Neither can it be denied that lotteries are proper subjects for the exercise of this power. We are aware that formerly, when the sources of public revenue were fewer than now, they were used in some or all of the states, and even in the District of Columbia, to raise money for the erection of public buildings, making public improvements, and not unfrequently for educational and religious purposes; but this court said, more than thirty years ago, speaking through Mr. Justice Grier, in Phalen v. Virginia, 8 How. 163, 168, that "experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; and it plunders the ignorant and simple." Happily, under the influence of restrictive legislation, the evils are not so apparent now; but we very much fear that with the same opportunities of indulgence the same results would be manifested.

If lotteries are to be tolerated at all, it is no doubt better that they should be regu-

lated by law, so that the people may be protected as far as possible against the inherent vices of the system; but that they are demoralizing in their effects, no matter how carefully regulated, cannot admit of a doubt. When the government is untrammeled by any claim of vested rights or chartered privileges, no one has ever supposed that lotteries could not lawfully be suppressed, and those who manage them punished severely as violators of the rules of social morality. From 1822 to 1867, without any constitutional requirement, they were prohibited by law in Mississippi, and those who conducted them punished as a kind of gamblers. During the provisional government of that state, in 1867, at the close of the late civil war, the present act of incorporation, with more of like character, was passed. The next year, 1868, the people, in adopting a new constitution with a view to the resumption of their political rights as one of the United States, provided that "the legislature shall never authorize any lottery, nor shall the sale of lottery-tickets be allowed, nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold." Article 12, § 15. There is now scarcely a state in the Union where lotteries are tolerated, and congress has enacted a special statute, the object of which is to close the mails against them. Rev. St. § 3894 (19 Stat. 90, § 2).

The question is therefore directly presented, whether, in view of these facts, the legislature of a state can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. Beer Co. v. Massachusetts, supra.

In Dartmouth College v. Woodward, 4 Wheat. 518, it was argued that the contract clause of the constitution, if given the effect contended for in respect to corporate franchises, "would be an unprofitable and vexatious interference with the internal concerns of a state, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for the purpose of internal government, and which, to subserve those purposes, ought to vary with varying circumstances" (page 628); but Mr. Chief Justice Marshall, when he announced the opinion of the court, was careful to say (page 629) "that the framers of the constitution did not intend to restrain states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed." The present case, we think, comes within this limitation. We have held, not, however, without strong opposition at times, that this clause protected a corporation in its charter exemptions from taxation. While taxation is in general necessary for the support of government, it is not part of the government itself. Government was not organized for the purposes of taxation, but taxation may be necessary for the purposes of government. As such, taxation becomes an incident to the exercise of the legitimate functions of government, but nothing more. No government dependent on taxation for support can bargain away its whole power of taxation, for that would be substantially abdication. All that has been determined thus far is, that for a consideration it may, in the exercise of a reasonable discretion, and for the public good, surrender a part of its powers in this particular.

But the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must "vary with varying circumstances." They may create corporations, and give them, so to speak, a limited citizenship; but as citizens, limited in their privileges, or otherwise, these creatures of the goverument creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality.

The contracts which the constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty. They are not, in the legal acceptation of the term, mala in se, but, as we have just seen, may properly be made mala prohibita. They are a species of gambling, and wrong in their influences. They disturb the checks and balances of a well-ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, "by the casting of lots, or by lot, chance, or otherwise," might be "awarded" to them from the accumulations of others. Certainly the right to suppress them is

governmental, to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the state. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal.

On the whole, we find no error in the record. Judgment affirmed.

Ex parte GARLAND.

(4 Wall. 333.)

Supreme Court of the United States. Dec., 1866.

This was a petition by A. H. Garland to the supreme court of the United States, asking permission to continue to practice as an attorney and counsellor of the court without taking the oath of office prescribed by Act Cong. Jan. 24, 1865, and the rule of court adopted pursuant thereto. Granted.

Reverdy Johnson, R. H. Marr, and M. H. Carpenter, for the petitioner, Mr. Garland.

Mr. Justice FIELD delivered the opinion of the court.

On the second of July, 1862, congress passed an act prescribing an oath to be taken by every person elected or appointed to any office of honor or profit under the government of the United States, either in the civil, military, or naval department of the public service, except the president, before entering upon the duties of his office, and before being entitled to its salary, or other emoluments. On the 24th of January, 1865, congress, by a supplementary act, extended its provisions so as to embrace attorneys and counsellors of the courts of the United States. This latter act provides that after its passage no person shall be admitted as an attorney and counsellor to the bar of the supreme court, and, after the fourth of March, 1865, to the bar of any circuit or district court of the United States, or of the court of claims, or be allowed to appear and be heard by virtue of any previous admission, or any special power of attorney, unless he shall have first taken and subscribed the oath prescribed by the act of July 2d, 1862. It also provides that the oath shall be preserved among the files of the court; and if any person take it falsely he shall be guilty of perjury, and, upon conviction, shall be subject to the pains and penalties of that offence.

At the December term, 1860, the petitioner was admitted as an attorney and counsellor of this court, and took and subscribed the oath then required. By the second rule, as it then existed, it was only requisite to the admission of attorneys and counsellors of this court, that they should have been such officers for the three previous years in the highest courts of the states to which they respectively belonged, and that their private and professional character should appear to be fair.

In March, 1865, this rule was changed by the addition of a clause requiring the administration of the oath, in conformity with the act of congress.

In May, 1861, the state of Arkansas, of which the petitioner was a citizen, passed an ordinance of secession, which purported to withdraw the state from the Union, and afterwards, in the same year, by another ordinance, attached herself to the so-called Confederate States, and by act of the congress of that Confederacy was received as one of its members.

The petitioner followed the state, and was one of her representatives—first in the lower house, and afterwards in the senate, of the congress of that Confederacy, and was a member of the senate at the time of the surrender of the Confederate forces to the armies of the United States.

In July, 1865, he received from the president of the United States a full pardon for all offences committed by his participation, direct or implied, in the Rebellion. He now produces his pardon, and asks permission to continue to practise as an attorney and counsellor of the court without taking the oath required by the act of January 24th, 1865, and the rule of the court, which he is unable to take, by reason of the offices he held under the Confederate government. He rests his application principally upon two grounds:

1st. That the act of January 24th, 1865, so far as it affects his status in the court, is unconstitutional and void; and,

2d. That, if the act be constitutional, he is released from compliance with its provisions by the pardon of the president.

The oath prescribed by the act is as follows:

1st. That the deponent has never voluntarily borne arms against the United States since he has been a citizen thereof;

2d. That he has not voluntarily given aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto;

3d. That he has never sought, accepted, or attempted to exercise the functions of any office whatsoever, under any authority, or pretended authority, in hostility to the United States;

4th. That he has not yielded a voluntary support to any pretended government, authority, power, or constitution, within the United States, hostile or inimical thereto; and,

5th. That he will support and defend the constitution of the United States against all enemies, foreign and domestic, and will bear true faith and allegiance to the same.

This last clause is promissory only, and requires no consideration. The questions presented for our determination arise from the other clauses. These all relate to past acts. Some of these acts constituted, when they were committed, offences against the criminal laws of the country; others may, or may not, have been offences according to the circumstances under which they were committed, and the motives of the parties. The first clause covers one form of the

crime of treason, and the deponent must declare that he has not been guilty of this crime, not only during the war of the Rebellion, but during any period of his life since he has been a citizen. The second clause goes beyond the limits of treason, and embraces not only the giving of aid and encouragement of a treasonable nature to a public enemy, but also the giving of assistance of any kind to persons engaged in armed hostility to the United States. The third clause applies to the seeking, acceptance, or exercise not only of offices created for the purpose of more effectually carrying on hostilities, but also of any of those offices which are required in every community, whether in peace or war, for the administration of justice and the preservation of order. The fourth clause not only includes those who gave a cordial and active support to the hostile government, but also those who yielded a reluctant obedience to the existing order, established without their co-operation.

The statute is directed against parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States. As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character. All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included.

In the exclusion which the statute adjudges it imposes a punishment for some of the acts specified which were not punishable at the time they were committed; and for other of the acts it adds a new punishment to that before prescribed, and it is thus brought within the further inhibition of the constitution against the passage of an ex post facto law. In the case of Cummings v. State (just decided) 4 Wall. 316, we have had occasion to consider at length the meaning of a bill of attainder and of an ex post facto law in the clause of the constitution forbidding their passage by the states, and it is unnecessary to repeat here what we there said. A like prohibition is contained in the constitution against enactments of this kind by congress; and the argument presented in that case against certain clauses of the constitution of Missouri is equally applicable to the act of congress under consideration in this case.

The profession of an attorney and counsellor is not like an office created by an act of congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the constitution. Attorneys and counsellors are not officers of the United States; they are not elected or appointed in the manner prescribed by the constitution for the election and appointment of such officers. They are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. It has been the general practice in this country to obtain this evidence by an examination of the parties. In this court the fact of the admission of such officers in the highest court of the states to which they respectively belong, for three years preceding their application, is regarded as sufficient evidence of the possession of the requisite legal learning, and the statement of counsel moving their admission sufficient evidence that their private and professional character is fair. The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded. Ex parte Heyfron, 7 How. (Miss.) 127; Fletcher v. Daingerfield, 20 Cal. 430. Their admission or their exclusion is not the exercise of a mere ministerial power. It is the exercise of judicial power, and has been so held in numerous cases. It was so held by the court of appeals of New York in Re Application of Cooper for Admission, 22 N. Y. 81. "Attorneys and counsellors," said that court, "are not only officers of the court, but officers whose duties relate almost exclusively to proceedings of a judicial nature. And hence their appointment may, with propriety, be intrusted to the courts, and the latter in performing this duty may very justly be considered as engaged in the exercise of their appropriate judicial functions."

In Ex parte Secombe, 19 How. 9, a mandamus to the supreme court of the territory of Minnesota to vacate an order removing an attorney and counsellor was denied by this court, on the ground that the removal was a judicial act. "We are not aware of any case," said the court, "where a mandamus was issued to an inferior tribunal, commanding it to reverse or annul its de-

cision, where the decision was in its nature a judicial act and within the scope of its jurisdiction and discretion." And in the same case the court observed, that "it has been well settled by the rules and practice of common law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed."

The attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency.

The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question, in this case, is not as to the power of congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the constitution. That this result cannot be effected indirectly by a state under the form of creating qualifications we have held in the case of Cummings v. State, 4 Wall. 316, and the reasoning by which that conclusion was reached applies equally to similar action on the part of congress.

This view is strengthened by a consideration of the effect of the pardon produced by the petitioner, and the nature of the pardoning power of the president.

The constitution provides that the president "shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment." Article 2, § 2.

The power thus conferred is unlimited, with the exception stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the president is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.

Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment. 4 Bl. Comm. 402; 6 Bac. Abr. tit. "Pardon"; Hawkins, bk. 2, c. 37, §§ 34, 54.

The pardon produced by the petitioner is a full pardon "for all offences by him committed, arising from participation, direct or implied, in the Rebellion," and is subject to certain conditions which have been complied with. The effect of this pardon is to relieve the petitioner from all penalties and disabilities attached to the offence of treason, committed by his participation in the Rebellion. So far as that offence is concerned, he is thus placed beyond the reach of punishment of any kind. But to exclude him, by reason of that offence, from continuing in the enjoyment of a previously acquired right, is to enforce a punishment for that offence notwithstanding the pardon. If such exclusion can be effected by the exaction of an expurgatory oath covering the offence, the pardon may be avoided, and that accomplished indirectly which cannot be reached by direct legislation. It is not within the constitutional power of congress thus to inflict punishment beyond the reach of executive clemency. From the petitioner, therefore, the oath required by the act of January 24th, 1865, could not be exacted, even if that act were not subject to any other objection than the one thus stated.

It follows, from the views expressed, that the prayer of the petitioner must be granted.

The case of R. H. Marr is similar, in its main features, to that of the petitioner, and his petition must also be granted.

And the amendment of the second rule of the court, which requires the oath prescribed by the act of January 24th, 1865, to be taken by attorneys and counsellors, having been unadvisedly adopted, must be rescinded. And it is so ordered.

Mr. Justice MILLER delivered the following dissenting opinion, which applies also to the opinion delivered in Cummings v. State, 4 Wall. 316:

I dissent from the opinions of the court just announced.

It may be hoped that the exceptional circumstances which give present importance to these cases will soon pass away, and that those who make the laws, both state and national, will find in the conduct of the per-

sons affected by the legislation just declared to be void, sufficient reason to repeal, or essentially modify it.

For the speedy return of that better spirit, which shall leave us no cause for such laws, all good men look with anxiety, and with a hope, I trust, not altogether unfounded.

But the question involved, relating, as it does, to the right of the legislatures of the nation, and of the state, to exclude from offices and places of high public trust, the administration of whose functions are essential to the very existence of the government, those among its own citizens who have been engaged in a recent effort to destroy that government by force, can never cease to be one of profound interest.

It is at all times the exercise of an extremely delicate power for this court to declare that the congress of the nation, or the legislative body of a state, has assumed an authority not belonging to it, and by violating the constitution, has rendered void its attempt at legislation. In the case of an act of congress, which expresses the sense of the members of a co-ordinate department of the government, as much bound by their oath of office as we are to respect that constitution, and whose duty it is, as much as it is ours, to be careful that no statute is passed in violation of it, the incompatibility of the act with the constitution should be so clear as to leave little reason for doubt, before we pronounce it to be invalid.

Unable to see this incompatibility, either in the act of congress or in the provision of the constitution of Missouri, upon which this court has just passed, but entertaining a strong conviction that both were within the competency of the bodies which enacted them, it seems to me an occasion which demands that my dissent from the judgment of the court, and the reasons for that dissent, should be placed on its records.

In the comments which I have to make upon these cases, I shall speak of principles equally applicable to both, although I shall refer more directly to that which involves the oath required of attorneys by the act of congress, reserving for the close some remarks more especially applicable to the oath prescribed by the constitution of the state of Missouri.

The constitution of the United States makes ample provision for the establishment of courts of justice to administer her laws, and to protect and enforce the rights of her citizens. Article 3, § 1, of that instrument, says that "the judicial power of the United States shall be vested in one supreme court, and such inferior courts as the congress may, from time to time, ordain and establish." Section 8 of article 1 closes its enumeration of the powers conferred on congress by the broad declaration that it shall have authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the constitution in the government of the United States, or in any department thereof."

Under these provisions, congress has ordained and established circuit courts, district courts, and territorial courts; and has, by various statutes, fixed the number of the judges of the supreme court. It has limited and defined the jurisdiction of all these, and determined the salaries of the judges who hold them. It has provided for their necessary officers, as marshals, clerks, prosecuting attorneys, bailiffs, commissioners, and jurors. And by the act of 1789, commonly called the judiciary act, passed by the first congress assembled under the constitution, it is among other things enacted, that "in all the courts of the United States the parties may plead and manage their causes personally; or by the assistance of such counsel or attorneys-at-law as, by the rules of the said courts respectively, shall be permitted to manage and conduct causes therein."

It is believed that no civilized nation of modern times has been without a class of men intimately connected with the courts, and with the administration of justice, called variously attorneys, counsellors, solicitors, proctors, and other terms of similar import. The enactment which we have just cited recognizes this body of men, and their utility in the judicial system of the United States, and imposes upon the courts the duty of providing rules, by which persons entitled to become members of this class, may be permitted to exercise the privilege of managing and conducting causes in these courts. They are as essential to the successful working of the courts, as the clerks, sheriffs, and marshals, and perhaps as the judges themselves, since no instance is known of a court of law without a bar.

The right to practise law in the courts as a profession, is a privilege granted by the law, under such limitations or conditions in each state or government as the law-making power may prescribe. It is a privilege, and not an absolute right. The distinction may be illustrated by the difference between the right of a party to a suit in court to defend his own cause, and the right of another to appear and defend for him. The one, like the right to life, liberty, and the pursuit of happiness, is inalienable. The other is the privilege conferred by law on a person who complies with the prescribed conditions.

Every state in the Union, and every civilized government, has laws by which the right to practise in its courts may be granted, and makes that right to depend on the good moral character and professional skill of the party on whom the privilege is conferred. This is not only true in reference to the first grant of license to practise law, but the continuance of the right is made, by these laws, to depend upon the continued possession of those qualities.

Attorneys are often deprived of this right,

upon evidence of bad moral character, or specific acts of immorality or dishonesty, which show that they no longer possess the requisite qualifications.

All this is done by law, either statutory or common; and whether the one or the other, equally the expression of legislative will, for the common law exists in this country only as it is adopted or permitted by the legislatures, or by constitutions.

No reason is perceived why this body of men, in their important relations to the courts of the nation, are not subject to the action of congress, to the same extent that they are under legislative control in the states, or in any other government; and to the same extent that the judges, clerks, marshals, and other officers of the court are subject to congressional legislation. Having the power to establish the courts, to provide for and regulate the practice in those courts, to create their officers, and prescribe their functions, can it be doubted that congress has the full right to prescribe terms for the admission, rejection, and expulsion of attorneys, and for requiring of them an oath, to show whether they have the proper qualifications for the discharge of their duties?

The act which has just been declared to be unconstitutional is nothing more than a statute which requires of all lawyers who propose to practise in the national courts, that they shall take the same oath which is exacted of every officer of the government, civil or military. This oath has two aspects; one which looks to the past conduct of the party, and one to his future conduct; but both have reference to his disposition to support or to overturn the government, in whose functions he proposes to take part. In substance, he is required to swear that he has not been guilty of treason to that government in the past, and that he will bear faithful allegiance to it in the future.

That fidelity to the government under which he lives, a true and loyal attachment to it, and a sincere desire for its preservation, are among the most essential qualifications which should be required in a lawyer, seems to me to be too clear for argument. The history of the Anglo-Saxon race shows that, for ages past, the members of the legal profession have been powerful for good or evil to the government. They are, by the nature of their duties, the moulders of public sentiment on questions of government, and are every day engaged in aiding in the construction and enforcement of the laws. From among their numbers are necessarily selected the judges who expound the laws and the constitution. To suffer treasonable sentiments to spread here unchecked, is to permit the stream on which the life of the nation depends to be poisoned at its source.

In illustration of this truth, I venture to affirm, that if all the members of the legal profession in the states lately in insurrection had possessed the qualification of a loyal and faithful allegiance to the government, we should have been spared the horrors of that Rebellion. If, then, this qualification be so essential in a lawyer, it cannot be denied that the statute under consideration was eminently calculated to secure that result.

The majority of this court, however, do not base their decisions on the mere absence of authority in congress, and in the states, to enact the laws which are the subject of consideration, but insist that the constitution of the United States forbids, in prohibitory terms, the passage of such laws, both to the congress and to the states. The provisions of that instrument, relied on to sustain this doctrine, are those which forbid congress and the states, respectively, from passing bills of attainder and ex post facto laws. It is said that the act of congress, and the provision of the constitution of the state of Missouri under review, are in conflict with both these prohibitions, and are therefore void.

I will examine this proposition, in reference to these two clauses of the constitution, in the order in which they occur in that instrument.

1. In regard to bills of attainder, I am not aware of any judicial decision by a court of federal jurisdiction which undertakes to give a definition of that term. We are therefore compelled to recur to the bills of attainder passed by the English parliament, that we may learn so much of their peculiar characteristics, as will enable us to arrive at a sound conclusion, as to what was intended to be prohibited by the constitution.

The word "attainder" is derived, by Sir Thomas Tomlins, in his law dictionary, from the words "attincta" and "attinctura," and is defined to be "the stain or corruption of the blood of a criminal capitally condemned; the immediate inseparable consequence of the common law, on the pronouncing the sentence of death." The effect of this corruption of the blood was, that the party attainted lost all inheritable quality, and could neither receive nor transmit any property or other rights by inheritance.

This attainder or corruption of blood, as a consequence of judicial sentence of death, continued to be the law of England, in all cases of treason, to the time that our constitution was framed, and, for aught that is known to me, is the law of that country, on condemnation for treason, at this day.

Bills of attainder, therefore, or acts of attainder, as they were called after they were passed into statutes, were laws which declared certain persons attainted, and their blood corrupted so that it had lost all heritable quality. Whether it declared other punishment or not, it was an act of attainder if it declared this. This also seems to have been the main feature at which the authors of the constitution were directing their prohibition; for after having, in article 1, prohibited the passage of bills of attainder—in

section 9, to congress, and in section 10, to the states—there still remained to the judiciary the power of declaring attainders. Therefore, to still further guard against this odious form of punishment, it is provided, in section 3 of article 3, concerning the judiciary, that, while congress shall have power to declare the punishment of treason, no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.

This, however, while it was the chief, was not the only peculiarity of bills of attainder which was intended to be included within the constitutional restriction. Upon an attentive examination of the distinctive features of this kind of legislation, I think it will be found that the following comprise those essential elements of bills of attainder, in addition to the one already mentioned, which distinguish them from other legislation, and which made them so obnoxious to the statesmen who organized our government:

1. They were convictions and sentences pronounced by the legislative department of the government instead of the judicial.

2. The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule.

3. The investigation into the guilt of the accused, if any such were made, was not necessarily or generally conducted in his presence, or that of his counsel, and no recognized rule of evidence governed the inquiry. See Story, Const. § 1344.

It is no cause for wonder that men who had just passed successfully through a desperate struggle in behalf of civil liberty should feel a detestation for legislation of which these were the prominent features. The framers of our political system had a full appreciation of the necessity of keeping separate and distinct the primary departments of the government. Mr. Hamilton, in the seventy-eighth number of the Federalist, says that he agrees with the maxim of Montesquieu, that "there is no liberty if the power of judging be not separated from the legislative and executive powers." And others of the ablest numbers of that publication are devoted to the purpose of showing that in our constitution these powers are so justly balanced and restrained that neither will probably be able to make much encroachment upon the others. Nor was it less repugnant to their views of the security of personal rights, that any person should be condemned without a hearing, and punished without a law previously prescribing the nature and extent of that punishment. They therefore struck boldly at all this machinery of legislative despotism, by forbidding the passage of bills of attainder and ex post facto laws, both to congress and to the states.

It remains to inquire whether, in the act of congress under consideration (and the remarks apply with equal force to the Missouri constitution), there is found any one of these features of bills of attainder; and if so, whether there is sufficient in the act to bring it fairly within the description of that class of bills.

It is not claimed that the law works a corruption of blood. It will, therefore, be conceded at once, that the act does not contain this leading feature of bills of attainder.

Nor am I capable of seeing that it contains a conviction or sentence of any designated person or persons. It is said that it is not necessary to a bill of attainder that the party to be affected should be named in the act, and the attainder of the Earl of Kildare and his associates is referred to as showing that the act was aimed at a class. It is very true that bills of attainder have been passed against persons by some description, when their names were unknown. But in such cases the law leaves nothing to be done to render its operation effectual, but to identify those persons. Their guilt, its nature, and its punishment are fixed by the statute, and only their personal identity remains to be made out. Such was the case alluded to. The act declared the guilt and punishment of the Earl of Kildare, and all who were associated with him in his enterprise, and all that was required to insure their punishment was to prove that association.

If this were not so, then the act was mere brutum fulmen, and the parties other than the earl could only be punished, notwithstanding the act, by proof of their guilt before some competent tribunal.

No person is pointed out in the act of congress, either by name or by description, against whom it is to operate. The oath is only required of those who propose to accept an office or to practise law; and as a prerequisite to the exercise of the functions of the lawyer, or the officer, it is demanded of all persons alike. It is said to be directed, as a class, to those alone who were engaged in the Rebellion; but this is manifestly incorrect, as the oath is exacted alike from the loyal and disloyal, under the same circumstances, and none are compelled to take it. Neither does the act declare any conviction, either of persons or classes. If so, who are they, and of what crime are they declared to be guilty? Nor does it pronounce any sentence, or inflict any punishment. If by any possibility it can be said to provide for conviction and sentence, though not found in the act itself, it leaves the party himself to determine his own guilt or innocence, and pronounce his own sentence. It is not, then, the act of congress, but the party interested, that tries and condemns. We shall see, when we come to the discussion of this act in its relation to ex post facto laws, that it inflicts no punishment.

A statute, then, which designates no criminal, either by name or description—which declares no guilt, pronounces no sentence,

and inflicts no punishment—can in no sense be called a bill of attainder.

2. Passing now to consider whether the statute is an ex post facto law, we find that the meaning of that term, as used in the constitution, is a matter which has been frequently before this court, and it has been so well defined as to leave no room for controversy. The only doubt which can arise is as to the character of the particular case claimed to come within the definition, and not as to the definition of the phrase itself.

All the cases agree that the term is to be applied to criminal causes alone, and not to civil proceedings. In the language of Justice Story, in the case of Watson v. Mercer, 8 Pet. 88, "Ex post facto laws relate to penal and criminal proceedings, which impose punishment and forfeiture, and not to civil proceedings, which affect private rights retrospectively." Calder v. Bull, 3 Dall. 386; Fletcher v. Peck, 6 Cranch, 87; Ogden v. Saunders, 12 Wheat. 266; Satterlee v. Matthewson, 2 Pet. 380.

The first case on the subject is that of Calder v. Bull, and it is the one in which the doctrine concerning ex post facto laws is most fully expounded. The court divides all laws which come within the meaning of that clause of the constitution into four classes:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.

2d. Every law that aggravates a crime, or makes it greater than it was when committed.

3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed.

4th. Every law that alters the rule of evidence, and receives less or different testimony than the law required at the time of the commission of the offence to convict the offender.

Again, the court says, in the same opinion, that "the true distinction is between ex post facto laws, and retrospective laws;" and proceeds to show that, however unjust the latter may be, they are not prohibited by the constitution, while the former are.

This exposition of the nature of ex post facto laws has never been denied, nor has any court or any commentator on the constitution added to the classes of laws here set forth, as coming within that clause of the organic law. In looking carefully at these four classes of laws, two things strike the mind as common to them all:

1st. That they contemplate the trial of some person charged with an offence.

2d. That they contemplate a punishment of the person found guilty of such offence.

Now, it seems to me impossible to show that the law in question contemplates either the trial of a person for an offence committed before its passage, or the punishment of any person for such an offence. It is true that the act requiring an oath provides a penalty for falsely taking it. But this provision is prospective, as no one is supposed to take the oath until after the passage of the law. This prospective penalty is the only thing in the law which partakes of a criminal character. It is in all other respects a civil proceeding. It is simply an oath of office, and it is required of all office-holders alike. As far as I am informed, this is the first time in the history of jurisprudence that taking an oath of office has been called a criminal proceeding. If it is not a criminal proceeding, then, by all the authorities, it is not an ex post facto law.

No trial of any person is contemplated by the act for any past offence. Nor is any party supposed to be charged with any offence in the only proceeding which the law provides.

A person proposing to appear in the court as an attorney is asked to take a certain oath. There is no charge made against him that he has been guilty of any of the crimes mentioned in that oath. There is no prosecution. There is not even an implication of guilt by reason of tendering him the oath, for it is required of the man who has lost everything in defence of the government, and whose loyalty is written in the honorable scars which cover his body, the same as of the guiltiest traitor in the land. His refusal to take the oath subjects him to no prosecution. His taking it clears him of no guilt, and acquits him of no charge.

Where, then, is this ex post facto law which tries and punishes a man for a crime committed before it was passed? It can only be found in those elastic rules of construction which cramp the powers of the federal government when they are to be exercised in certain directions, and enlarge them when they are to be exercised in others. No more striking example of this could be given than the cases before us, in one of which the constitution of the United States is held to confer no power on congress to prevent traitors practising in her courts, while in the other it is held to confer power on this court to nullify a provision of the constitution of the state of Missouri, relating to a qualification required of ministers of religion.

But the fatal vice in the reasoning of the majority is in the meaning which they attach to the word punishment, in its application to this law, and in its relation to the definitions which have been given of the phrase, ex post facto laws.

Webster's second definition of the word "punish" is this: "In a loose sense, to afflict with punishment, &c., with a view to amendment, to chasten." And it is in this loose sense that the word is used by this court, as synonymous with chastisement, correction, loss, or suffering to the party supposed to be punished, and not in the legal

sense, which signifies a penalty inflicted for the commission of crime.

And so, in this sense, it is said that whereas persons who had been guilty of the offences mentioned in the oath were, by the laws then in force, only liable to be punished with death and confiscation of all their property, they are by a law passed since these offences were committed, made liable to the enormous additional punishment of being deprived of the right to practise law!

The law in question does not in reality deprive a person guilty of the acts therein described of any right which he possessed before; for it is equally sound law, as it is the dictate of good sense, that a person who, in the language of the act, has voluntarily borne arms against the government of the United States while a citizen thereof, or who has voluntarily given aid, comfort, counsel, or encouragement to persons engaged in armed hostility to the government, has, by doing those things, forfeited his right to appear in her courts and take part in the administration of her laws. Such a person has exhibited a trait of character which, without the aid of the law in question, authorizes the court to declare him unfit to practise before it, and to strike his name from the roll of its attorneys if it be found there.

I have already shown that this act provides for no indictment or other charge, that it contemplates and admits of no trial, and I now proceed to show that even if the right of the court to prevent an attorney, guilty of the acts mentioned, from appearing in its forum, depended upon the statute, that still it inflicts no punishment in the legal sense of that term.

"Punishment," says Mr. Wharton in his law lexicon, "is the penalty for transgressing the laws;" and this is, perhaps, as comprehensive and at the same time as accurate a definition as can be given. Now, what law is it whose transgression is punished in the case before us? None is referred to in the act, and there is nothing on its face to show that it was intended as an additional punishment for any offence described in any other act. A part of the matters of which the applicant is required to purge himself on oath may amount to treason, but surely there could be no intention or desire to inflict this small additional punishment for a crime whose penalty already was death and confiscation of property.

In fact the word "punishment" is used by the court in a sense which would make a great number of laws, partaking in no sense of a criminal character, laws for punishment, and therefore ex post facto.

A law, for instance, which increased the facility for detecting frauds by compelling a party to a civil proceeding to disclose his transactions under oath would result in his punishment in this sense, if it compelled him to pay an honest debt which could not be coerced from him before. But this law comes clearly within the class described by this court in Watson v. Mercer, as civil proceedings which affect private rights retrospectively.

Again, let us suppose that several persons afflicted with a form of insanity heretofore deemed harmless, shall be found all at once to be dangerous to the lives of persons with whom they associate. The state, therefore, passes a law that all persons so affected shall be kept in close confinement until their recovery is assured. Here is a case of punishment in the sense used by the court for a matter existing before the passage of the law. Is it an ex post facto law? And, if not, in what does it differ from one? Just in the same manner that the act of congress does, namely, that the proceeding is civil and not criminal, and that the imprisonment in the one case and the prohibition to practise law in the other, are not punishments in the legal meaning of that term.

The civil law maxim, "Nemo debet bis vexari, pro unâ et eadam causâ," has been long since adopted into the common law as applicable both to civil and criminal proceedings, and one of the amendments of the constitution incorporates this principle into that instrument so far as punishment affects life or limb. It results from this rule, that no man can be twice lawfully punished for the same offence. We have already seen that the acts of which the party is required to purge himself on oath constitute the crime of treason. Now, if the judgment of the court in the cases before us, instead of permitting the parties to appear without taking the oath, had been the other way, here would have been the case of a person who, on the reasoning of the majority, is punished by the judgment of this court for the same acts which constitute the crime of treason.

Yet, if the applicant here should afterwards be indicted for treason on account of these same acts, no one will pretend that the proceedings here could be successfully pleaded in bar of that indictment. But why not? Simply because there is here neither trial nor punishment within the legal meaning of these terms.

I maintain that the purpose of the act of congress was to require loyalty as a qualification of all who practise law in the national courts. The majority say that the purpose was to impose a punishment for past acts of disloyalty.

In pressing this argument it is contended by the majority that no requirement can be justly said to be a qualification which is not attainable by all, and that to demand a qualification not attainable by all is a punishment.

The constitution of the United States provides as a qualification for the offices of president and vice-president that the person elected must be a native-born citizen. Is this a punishment to all those naturalized

citizens who can never attain that qualification? The constitutions of nearly all the states require as a qualification for voting that the voter shall be a white male citizen. Is this a punishment for all the blacks who can never become white?

Again, it was a qualification required by some of the state constitutions, for the office of judge, that the person should not be over sixty years of age. To a very large number of the ablest lawyers in any state this is a qualification to which they can never attain, for every year removes them farther away from the designated age. Is it a punishment?

The distinguished commentator on American law, and chancellor of the state of New York, was deprived of that office by this provision of the constitution of that state, and he was thus, in the midst of his usefulness, not only turned out of office, but he was forever disqualified from holding it again, by a law passed after he had accepted the office.

This is a much stronger case than that of a disloyal attorney forbidden by law to practise in the courts, yet no one ever thought the law was ex post facto in the sense of the constitution of the United States.

Illustrations of this kind could be multiplied indefinitely, but they are unnecessary.

The history of the time when this statute was passed—the darkest hour of our great struggle—the necessity for its existence, the humane character of the president who signed the bill, and the face of the law itself, all show that it was purely a qualification, exacted in self-defence, of all who took part in administering the government in any of its departments, and that it was not passed for the purpose of inflicting punishment, however merited, for past offences.

I think I have now shown that the statute in question is within the legislative power of congress in its control over the courts and their officers, and that it was not void as being either a bill of attainder or an ex post facto law.

If I am right on the questions of qualification and punishment, that discussion disposes also of the proposition, that the pardon of the president relieves the party accepting it of the necessity of taking the oath, even if the law be valid.

I am willing to concede that the presidential pardon relieves the party from all the penalties, or in other words, from all the punishment, which the law inflicted for his offence. But it relieves him from nothing more. If the oath required as a condition to practising law is not a punishment, as I think I have shown it is not, then the pardon of the president has no effect in releasing him from the requirement to take it. If it is a qualification which congress had a right to prescribe as necessary to an attorney, then the president cannot, by pardon or otherwise, dispense with the law requiring such qualification.

This is not only the plain rule as between the legislative and executive departments of the government, but it is the declaration of common sense. The man who, by counterfeiting, by theft, by murder, or by treason, is rendered unfit to exercise the functions of an attorney or counsellor-at-law, may be saved by the executive pardon from the penitentiary or the gallows, but is not thereby restored to the qualifications which are essential to admission to the bar. No doubt it will be found that very many persons among those who cannot take this oath, deserve to be relieved from the prohibition of the law; but this in no wise depends upon the act of the president in giving or refusing a pardon. It remains to the legislative power alone to prescribe under what circumstances this relief shall be extended.

In regard to the case of Cummings v. State of Missouri, allusions have been made in the course of argument to the sanctity of the ministerial office, and to the inviolability of religious freedom in this country.

But no attempt has been made to show that the constitution of the United States interposes any such protection between the state governments and their own citizens. Nor can anything of this kind be shown. The federal constitution contains but two provisions on this subject. One of these forbids congress to make any law respecting the establishment of religion, or prohibiting the free exercise thereof. The other is, that no religious test shall ever be required as a qualification to any office or public trust under the United States

No restraint is placed by that instrument on the action of the states; but on the contrary, in the language of Story, "The whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice and the state constitutions." Const. § 1878.

If there ever was a case calling upon this court to exercise all the power on this subject which properly belongs to it, it was the case of Permoli v. Municipality, No. 1, 3 How. 589.

An ordinance of the first municipality of the city of New Orleans imposed a penalty on any priest who should officiate at any funeral, in any other church than the obituary chapel. Mr. Permoli, a Catholic priest, performed the funeral services of his church over the body of one of his parishioners, inclosed in a coffin, in the Roman Catholic Church of St. Augustine. For this he was fined, and relying upon the vague idea advanced here, that the federal constitution protected him in the exercise of his holy functions, he brought the case to this court.

But hard as that case was, the court replied to him in the following language: "The constitution (of the United States) makes no provision for protecting the citizens of the respective states in their religious lib-

erties; this is left to the state constitutions and laws; nor is there any inhibition imposed by the constitution of the United States in this respect on the states." Mr. Permoli's writ of error was, therefore, dismissed for want of jurisdiction.

In that case an ordinance of a mere local corporation forbade a priest, loyal to his government, from performing what he believed to be the necessary rites of his church over the body of his departed friend. This court said it could give him no relief.

In this case the constitution of the state of Missouri, the fundamental law of the people of that state, adopted by their popular vote, declares that no priest of any church shall exercise his ministerial functions, unless he will show, by his own oath, that he has borne a true allegiance to his government. This court now holds this constitutional provision void, on the ground that the federal constitution forbids it. I leave the two cases to speak for themselves.

In the discussion of these cases I have said nothing, on the one hand, of the great evils inflicted on the country by the voluntary action of many of those persons affected by the laws under consideration; nor, on the other hand, of the hardships which they are now suffering, much more as a consequence of that action than of any laws which congress can possibly frame. But I have endeavored to bring to the examination of the grave questions of constitutional law involved in this inquiry those principles alone which are calculated to assist in determining what the law is, rather than what, in my private judgment, it ought to be.

Mr. Chief Justice CHASE, Mr. Justice SWAYNE, and Mr. Justice DAVIS concur in this dissent.

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